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January 8, 2016

REDACTED FOR PUBLIC INSPECTION

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communication Commission
455 12th Street, S.W.
Washington, DC 20054

Re: WC Docket No. 15-247: Public Version of AT&T's Direct Case in Response to the Commission's Order Initiating Investigation and Designating Issues For Investigation

Dear Ms. Dortch:

Pursuant to the Order and Protective Orders adopted by the Commission in this proceeding,[1] AT&T Inc. ("AT&T") respectfully submits the enclosed **public version** of its Direct Case in response to the Wireline Competition Bureau's October 16, 2015 Order Initiating Investigation and Designating Issues for Investigation in WC Docket No. 15-247.

Respectfully,

Kyle Fiet

Kyle J. Fiet

Enclosures

[1] Order and Protective Orders, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 15-247, 05-25, RM-10593, DA 15-1387 (Dec. 4, 2015) ("*Protective Order*").

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

BRIEF OF AT&T INC. IN SUPPORT OF ITS DIRECT CASE

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January 8, 2016

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BRIEF OF AT&T INC. IN SUPPORT OF ITS DIRECT CASE

Pursuant to the Order Initiating Investigation and Designating Issues for Investigation in the above-captioned docket, released October 16, 2015 ("*Designation Order*"),[1] AT&T submits this Brief in Support of Its Direct Case.

INTRODUCTION AND SUMMARY

The Commission has set for investigation four AT&T pricing plans that offer DS1 special access services. The *Designation Order* makes clear that this proceeding will be an investigation of the CLECs' long-held and oft-repeated "lock-in" theory. Under the "lock-in" theory, the CLECs claim they have "no choice" but to take service under these four DS1 tariffs because of AT&T's "overwhelming control of the special access marketplace." According to the CLECs, these four pricing plans contain certain volume-related commitments that have "locked up" so much of the available business that competitors do not have sufficient "addressable demand" to

[1] Order Initiating Investigation and Designating Issues for Investigation, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-274 (rel. Oct. 16, 29015).

invest in alternative networks and CLECs cannot otherwise shift their purchases to other providers.[2]

These claims are fundamentally inconsistent with the facts, the nature of these tariffs, the law, economic theory, and the basic realities of today's marketplace. The *Designation Order* repeatedly gives the impression that the four AT&T pricing plans under investigation represent a large portion of the marketplace. This factual assumption is a critical premise of the CLECs' "lock-in" theory, which is at its core a theory of market foreclosure. The real facts, however, are quite different. Special access customers today can and do choose from a wide array of options, most of which they can obtain from multiple providers. These include Ethernet services,

[2] At the outset, it should be emphasized that any decision in this investigation that would be adverse to the ILECs already faces serious questions of both process and proof. The allegations at the heart of this case are that CLECs do not have competitive alternatives to DS1s and that the tariffs at issue are preventing them from shifting services to other providers. The *Designation Order*, however, seeks data and evidence only from the ILECs. The ILEC data can only identify the purchases the CLECs make from ILECs. They cannot identify the portion of circuits that CLECs purchase from other sources. Nor can they provide a complete picture of similar terms and conditions that the CLECs themselves offer. Although the Commission recently granted the ILECs' motion to permit use of the industry-wide data collected in the special access rulemaking proceeding, that data is already more than two years old, and the Commission sat on the motion for access to this data for more than a month, so that the earliest that parties were allowed to use these data for the purposes of this proceeding was December 16, 2015. And then, notwithstanding the enormity and complexity of the data, the Commission granted only a three-week extension, from December 18 to January 8, for comments to be due. Most surprising of all, in limiting the extension to three weeks, the Commission credited arguments that ILEC experts should not need more time because they had access to the data for purposes of another proceeding prior to December 16. *See* Order, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, ¶ 4 (Dec. 14, 2015). That reasoning is inconsistent with the terms of the Commission's own protective orders. For the reasons explained in the expert declarations submitted by the ILECs, and summarily dismissed by the Commission, the three week extension (during the holiday season) did not, in fact, give AT&T's experts sufficient time to analyze the data set for purposes of this investigation. *See* Joint Request For Extension Of Time Of AT&T Inc., Verizon, Century Link, And Frontier, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No 15-247, at 2-8 (Dec. 9, 2015); Carlton-Israel-Shampine-Sider Decl. ¶ 21 (Attachment 3 to AT&T's Direct Case). Thus this Direct Case had to be filed without the benefit of that analysis.

unbundled network elements, DS3 and optical services. AT&T's legacy TDM DS1 services, at issue here, are merely one such option, and a rapidly declining one at that. Indeed, AT&T lost *more than* **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *percent* of its DS1 business from non-affiliates just between January 2013 and October 2015, and the rate of loss is accelerating.[3] Moreover, within the rapidly declining DS1 portion of the marketplace, only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's DS1 channel terminations are associated with circuits purchased under the portability plans at issue (**[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of sales to nonaffiliates), and the CLECs that use the portability plans typically have a large amount of "headroom" to move circuits to other providers without any contractual liability at all.[4] Indeed, as shown below, the DS1 services in these four tariffed pricing plans represent well below 10 percent of the total special access marketplace in AT&T's in-region territory.[5]

These facts alone refute the CLECs' lock-in claims. The mass exodus of customers from AT&T's DS1 services over the past two years demonstrates, not that customers are "locked into" these services, but quite the opposite: that they have other options in the marketplace and that they are free to exercise those options. And the small and declining portion of demand associated with the services at issue here, coupled with the substantial headroom enjoyed by those who continue to use them, shows that the tariff provisions at issue could not even theoretically constrain competition.

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[3] Declaration of Paul Reid ¶ 18 ("Reid Decl.) (attached hereto as Attachment 1); Declaration of Dennis Carlton, Mark Israel, Allan Shampine & Hal Sider ¶ 19 ("Carlton-Israel-Shampine-Sider") (attached hereto as Attachment 3).

[4] Reid Decl. ¶¶ 21-25; Carlton-Israel-Shampine-Sider Decl. ¶¶ 25-37.

[5] *See also* Carlton-Israel-Shampine-Sider Decl. ¶¶ 12, 21.

That the facts so dramatically belie CLEC claims of foreclosure should come as no surprise because the CLECs also have misrepresented the terms of the four AT&T tariffs at issue in this investigation. According to the Commission, the "heart of the CLECs' concerns" – and thus the primary focus of the *Designation Order* – are provisions requiring CLECs to make certain volume-related commitments (which the Commission refers to as "percentage commitments") in order to receive rate discounts. But the percentage commitments to which the Commission refers are not rate discounts. In fact, none of the AT&T tariffs at issue include volume-based discounts. Rather, at least for AT&T's tariffs, the "percentage commitments" are simply backstops that limit AT&T's exposure when customers want the flexibility to break their term plan commitments without the normal early termination liability ("ETL"). The Commission has not designated AT&T's pure term-discount tariffs for investigation, and indeed, the CLECs themselves offer term-discount plans with terms and ETLs that are similar to or less generous than AT&T's. It is thus difficult to see how these services, which give customers the *option* of avoiding ETLs normally associated with term discounts, could be unlawful.

Ironically, AT&T instituted the portability plans at issue at the *request* of certain CLEC customers who sought more flexibility to move circuits around without incurring ETLs. These plans give them that flexibility, and most even enable them to disconnect a significant percentage of their circuits that are still under term commitments without replacing them or incurring ETLs. Moreover, when the plans expire, customers are free to reset their commitment at whatever level they choose (if they choose to renew at all), as percentage commitments are not tied to historical purchases, but rather to purchases the customer chooses to bring within the plan in each contract period. And even if the customer cancels enough circuits to incur a shortfall penalty, the

customer still receives the term discounts on all of its remaining circuits as the percentage commitments are not associated with greater rate discounts.

Because AT&T's portability plans give customers who want it added flexibility above and beyond that which is ordinarily associated with a term plan commitment, they are affirmatively *pro*-competitive. They also fall squarely within the reasoning of *BellSouth v. FCC*, where the D.C. Circuit upheld a volume discount plan on the ground that it was simply an option that customers could choose or not choose. As in *BellSouth*, the plans at issue are "most naturally viewed as a bargain containing terms that both benefit and burden subscribers" and that are the result of the customer's "free choice."[6] And as in *BellSouth*, the evidence here confirms that CLECs use these "percentage commitment" plans only when those plans suit their needs. In fact, some of the CLECs that are the loudest complainers in this proceeding do not even take service under the AT&T pricing plans under investigation, and the ones that do generally have ample "headroom" (and/or other contractual arrangements) and thus the freedom to shift purchases to competitors without penalty.[7]

While the facts and the law belie CLEC claims about anticompetitive effects, so too does the economic literature. Indeed, the courts,[8] the Commission,[9] and economists[10] have

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[6] *BellSouth* v. *FCC*, 469 F.3d 1052, 1055-60 (D.C. Cir. 2006).

[7] Reid Decl. ¶¶ 22-33.

[8] *BellSouth*, 469 F.3d at 1055-60; *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) ("[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition") (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

[9] Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 79-80 (rel. Aug. 27, 1999) (*"Pricing Flexibility Order"*) (rejecting allegations that giving incumbents additional authority to reduce prices would allow them to "forestall the entry of potential competitors by 'locking up' large customers by offering them volume and term discounts at or below cost" given that the triggers necessarily indicate the presence of extensive sunk competitive facilities).

overwhelmingly recognized that term and volume discounts are generally pro-competitive and appropriate in the special access marketplace.[11] To be sure, the *Designation Order* cites some recent economic papers presenting theoretical models of various types of contractual arrangements that could harm competition through market foreclosure, but none of these papers has any bearing on the AT&T pricing plans at issue, as Drs. Carlton, Israel, Shampine and Sider explain in the attached declaration. Rather, all of those foreclosure models require as a basic premise "that a sufficiently large amount of demand be locked up thereby leaving insufficient demand for rivals with the result that there is a harm to competition."[12] That premise cannot be met here because the AT&T tariffs at issue leave a large amount of "demand available to rivals that is unencumbered by contractual restrictions related to portability."[13] Further, Drs. Carlton, Israel, Shapiro and Sider demonstrate that the volume of DS-1 circuits currently served by AT&T that are not covered by term or volume commitments is large enough to enable CLECs to greatly expand their DS1 sales relative to their current scale.[14] The CLEC theories thus fail at the first step.

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[10] *E.g.*, Rasmusen, Ramseyer, and Wiley, Jr., "Naked Exclusion: Reply," 90 Am. Econ. Rev. 310 (2000) (cited in *Designation Order* ¶ 19 n.54) ("normally a firm cannot use contracts with its customers or suppliers inefficiently to exclude a rival from competition, because the high price of these contracts will make this strategy unprofitable"); *see generally* Carlton-Israel-Shampine-Snider Decl. ¶¶ 60-73 (discussing literature).

[11] *See, e.g.*, Fourth Memorandum Opinion And Order On Reconsideration, *Transport Rate Structure and Pricing*, 10 FCC Rcd. 12979, ¶ 13 (1995) (*citing Expanded Interconnection Order*, 7 FCC Rcd. 7369, ¶ 199 (1992)) ("both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships"); Third Report and Order, *Access Charge Reform*, 11 FCC Rcd. 21354, ¶ 187 (1996) (volume and term "discounts should be permitted . . . because they encourage efficiency and full competition").

[12] Carlton-Israel-Shampine-Sider Decl. ¶ 57.

[13] *Id.* ¶ 58.

[14] *Id*. ¶¶ 23-37.

An analysis of changes in the broader special access marketplace (even without the benefit of the data subject to the Commission's mandatory data collection) only further confirms that the CLECs' foreclosure theories do not pass the most basic reality check. In essence, the CLECs are claiming that these four AT&T DS1 pricing plans are preventing the emergence of competition. At this late date, the claim is preposterous. The Ameritech and BellSouth tariffs at issue were filed in 1993; the Southwestern Bell and Pacific Bell tariffs in 2003. In the ensuing years, CLECs, cable providers, and others have invested billions of dollars to build hundreds of thousands of miles of fiber networks and connections to individual buildings in every area of the country where demand for special access exists. During this same time, the emergence and explosive growth of Ethernet replacements quite literally have put the DS1 services at issue here on a path to extinction. Notably, there currently are dozens of non-ILEC providers of Ethernet services, no provider has port share that exceeds one-fifth of the market,[15] and some of the most prominent complaining CLECs here, including Level 3, are among the largest Ethernet providers.[16] Indeed, even Birch Communications, a smaller CLEC, has announced that it will soon have 1 million buildings on its Ethernet network, which underscores that such next-generation investments are neither foreclosed nor fundamentally uneconomic.[17] And cable

[15] Vertical Systems Group, ENS Research Program (2015).

[16] Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD, (Aug. 24, 2015), http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/ (there are eight providers with port shares of four percent or more, including two CLECs and three of the nation's largest cable companies, and Level 3 is the second largest Ethernet provider in the U.S. measured by port share).

[17] Sean Buckley, *Birch's Oddo: We'll expand our fiber network to 1M buildings via organic builds, partner agreements*, Fierce Telecom, http://www.fiercetelecom.com/story/birchs-oddo-well-expand-our-fiber-network-1m-buildings-organic-builds-partn/2015-12-02 (Dec. 2, 2015) ("Birch Communications has set an ambitious goal to expand its fiber presence into 1 million buildings" and quoting CEO as saying "We have presence across a 22 state area, but pretty quickly this will be across all 50 states and probably close to 1 million buildings in 2016").

companies are aggressively pursuing enterprise customers with Ethernet services and apparently view the complaining CLECs as their main competition.[18]

To be sure, there may be certain areas of the country where special access competition is less intense. But the CLEC theory posited in the *Designation Order* – that ILECs can leverage market power in those areas into areas where numerous CLECs are competing for special access business – is specious because competition is most robust in those areas that account for the lion's share of special access demand. The leveraging theory thus assumes that the tail can wag the dog. And in all events, these theories depend on the notion that the "tail" of the dog is somehow necessary to qualify for essential volume discounts, which is infirm, not only because the tail is too small, but because neither the portability plans at issue nor AT&T's other term plans even have volume discounts: AT&T's discounts are term-based and do not vary with the number of circuits purchased.

For all of these reasons, there is no basis for a finding that the terms and conditions in the four AT&T tariffs at issue violate the Communications Act. In fact, the only thing that could slow that investment would be Commission intervention here to lower artificially the economic cost of legacy TDM DS1 services. That would be an odd policy for a Commission set on promoting broadband investment, and there is no basis for such a step in either Section 201(b) or 202(a) of the Act.

The remainder of this brief is organized as follows. Section I places the issues here in proper context by discussing the marketplace and competitive context in which the four tariffs at

[18] Carol Wilson, *Cable Looking Past AT&T, Verizon*, Light Reading, Dec. 4, 2015, http://www.lightreading.com/cable/cable-business-services/cable-looking-past-atandt-verizon/d/d-id/719679 (quoting executive of a large cable company as saying it "no longer views [ILECs] as the top players in the enterprise space, but is seeing aggressive activity from competitive players such as Level 3 . . . and XO").

issue are offered, the nature and terms of these tariffs, and the foreclosure theories on which the CLEC claims are based. As Section I shows, the claims here are based on factual assumptions that are not based in reality, and a more accurate understanding of both the factual and competitive context confirms that these tariffs do not have anticompetitive effects. Then in Section II, as requested in the *Designation Order*, AT&T addresses in order each of the specific issues the *Designation Order* raises, which relate to (1) percentage commitments; (2) shortfall penalties; (3) upper percentage thresholds and related overage penalties; (4) term commitments; (5) early termination penalties; and (6) whether certain broadband services agreements should be tariffed.

I. THE SPECIAL ACCESS MARKETPLACE IS ROBUSTLY COMPETITIVE AND THE AT&T TARIFFS AT ISSUE ARE PRO-COMPETITIVE.

Before we address each of the specific issues raised by the Commission in the *Designation Order*, it is important to take a step back and correct certain misperceptions of the four AT&T tariffs at issue and their role in the marketplace. As noted above, the *Designation Order* is based on a series of CLEC allegations that the AT&T tariffs at issue harm competition by "locking up" the available demand, which allegedly prevents CLECs from investing in competing facilities or moving their services to alternative providers. The CLECs' theories depend critically on certain factual assumptions – namely, that the tariffs at issue have captured a large portion of the available special access demand and that these tariffs require these CLECs to commit a large percentage of their existing AT&T volumes to AT&T in order to get rate discounts. And while the Commission and economists have generally considered such term and volume-related contractual provisions to be pro-competitive, the CLEC theories attempt to overcome this presumption by trying to shoehorn the tariffs at issue into what are recognized to be narrow exceptions to the prevailing economic view.

But those exceptions depend on key factual predicates that are wholly inapt in this context. As discussed below, (1) AT&T's DS1 sales are declining at a rapid pace, and the plans that are subject to this investigation represent a small and rapidly diminishing portion of the demand for special access services; (2) the "percentage commitments" in these AT&T tariffs at issue have nothing to do with increased rate discounts but instead permit customers to avoid early termination liabilities in their term-discount plans and are thus pro-competitive; and (3) the economic literature, including the papers cited in the *Designation Order*, confirms that the AT&T tariffs at issue do not facilitate a market foreclosure strategy.

A. Special Access Customers Have Many Choices, And The AT&T Tariffs At Issue Represent Only A Small And Shrinking Portion Of The Overall Special Access Marketplace.

The Commission is investigating four AT&T pricing plans in this proceeding that are in four specified tariffs.[19] All four pricing plans govern the provision of a single high-capacity service: legacy TDM DS1s. The *Designation Order* is replete with statements and quoted (but unsubstantiated) CLEC assertions that give the impression that a very large portion of the overall demand for special access services is served under these pricing plans.[20] The Commission states

[19] In particular, the FCC has stated it is investigating the Discount Commitment Program (DCP) in the Ameritech region, Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13; the Area Commitment Plan (ACP) in the BellSouth region, BellSouth Telecommunications, LLC, Tariff F.C.C. No. 1, § 2.4.8(B); and the Term Payment Plans (TPP) in the Pacific Bell and Southwestern Bell regions. Pacific Bell Telephone Company Tariff F.C.C. No. 1, § 7.4.18; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 7.2.22. *Designation Order*, Appendix "Incumbent LEC Tariff Pricing Plans Subject to Investigation," p. 56.

[20] *See, e.g.*, *Designation Order* ¶¶ 2-5; *id*. ¶ 6 (CLECs "assert that the effect [of the tariff provisions] is to lock up substantial proportions of carrier and end-user demand"); *id*. ¶ 12 (percentage volume commitments "require purchasers to commit a high percentage of their historical or existing purchases when they enter into an incumbent LEC tariff plan," and quoting Sprint as saying "purchases from the incumbent typically amount to the vast majority of their total special access purchases"); *id.* ¶ 13 (quoting XO as stating that "TDM purchases" are still a "significant percentage of XO's in-service DS1 and DS3 circuits as well as its new installs"); *id.* ¶ 31.

that "preliminary analysis" of the special access data collection shows that "TDM-based special access sales totaled approximately $25 billion or about 60 percent of the total special access market of about $40 billion,"[21] with the implication that much of these "TDM-based services" are purchased under the "percentage commitment" tariffs that are "the heart of [the] competitive LECs' concerns."[22] Whatever the source of the Commission's assumptions, the facts, at least as they relate to AT&T, are otherwise. Even without the benefit of a meaningful opportunity to analyze and incorporate into this response the 2013 data collected by the Commission, and notwithstanding the Commission's failure to extend its data request to relevant information that only the CLECs possess, it is evident that the lock-in theories articulated in the *Designation Order* do not apply to the AT&T tariffs at issue. Indeed, far from supporting a foreclosure theory, the facts demonstrate that demand is rapidly moving away from TDM DS1 services to competitively provided alternatives, like Ethernet, and that the tariffs at issue represent a small and diminishing proportion of AT&T's special access sales – an amount that is far too little to be the basis for foreclosure under any economic theory.

First, arguments that the provisions at issue lock customers into AT&T DS1 services cannot be squared with the overriding reality that Ethernet services are rapidly supplanting the TDM services at issue in this proceeding. As the Commission acknowledges, the special access marketplace is undergoing a profound transformation, as Ethernet services are well on their way to completely replacing legacy TDM services.[23] Ethernet services have seen explosive growth

[21] *Id.* ¶ 14.

[22] *See id*. ¶¶ 12-14.

[23] *Designation Order* ¶ 11. Indeed, even as the Commission has opened this investigation, it is simultaneously conducting a rulemaking proceeding to manage the impending retirement of the very services at issue. *See id.* (citing *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications; Technology Transitions et al.*, GN Docket No. 13-5, Order, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 1433 (2014)).

over the last several years, and the ongoing shift to Ethernet services is now irreversible. The Commission itself acknowledges that its "preliminary" analysis of the special access data collection shows that, as of 2013, about 40 percent of special access demand was for services other than TDM (*i.e.*, Ethernet).[24] But the growth of Ethernet services has accelerated in the ensuing two years. One analyst has explained that "U.S. Ethernet port growth in the first half of 2015 was unprecedented, easily surpassing estimates. . . . [and that one of the p]rimary growth drivers for 2015 [is] massive migration from TDM to Ethernet services."[25] Thus, the 40 percent number cited in the *Designation Order* is undoubtedly too low.

Many different companies are deploying Ethernet networks and winning customers, including the complaining CLECs. When Ethernet first became available, no provider had a nationwide Ethernet network, including the incumbent LECs, and thus all carriers were starting from scratch with no incumbent advantage. Over the past decade or more, a wide variety of companies, including ILECs, CLECs, cable companies, and others, have invested billions of dollars to deploy Ethernet services for their customers. The result is that there are dozens of non-ILEC providers of Ethernet services, and no provider has a port share that exceeds one-fifth of the market.[26] Indeed, there are eight providers with port shares of 5 percent or more, including two CLECs, and three of the nation's largest cable companies.[27] Further, one of the loudest complainers in this proceeding, Level 3, is the second largest Ethernet provider in the U.S. measured by port share,[28] and Comcast, which was recently named the fastest growing Ethernet

[24] *Designation Order* ¶ 2.

[25] Vertical Systems Group, "Ethernet Market Share – U.S.: Mid-2015 U.S. Port Share."

[26] Vertical Systems Group, ENS Research Program (2015).

[27] Vertical Systems Group, Mid-Year 2015 U.S.Carrier Ethernet LEADERBOARD, (Aug. 24, 2015), http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[28] *Id*.

provider for the second consecutive year, is said by analysts to be "well positioned in 2015 due to its extensive fiber network footprint."[29] Other providers – *i.e.*, those with port shares under 4% – together have, in the aggregate, port share in excess of 20%.[30]

Moreover, Ethernet services are not the only option for customers that seek an alternative to an AT&T DS1 line. They also may be able to avail themselves of competitively provided optical or DSn services or unbundled network elements ("UNEs"). For example, CLECs still purchase hundreds of thousands of DS1 UNE loops from AT&T, and some of the largest purchasers include some of the complaining CLECs here, such as **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** (more than 170,000 lines in 2014) and **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** (more than 30,000 lines in 2014).

Although the Commission has not collected current industry-wide data in this proceeding, the data being submitted by AT&T vividly confirm these trends. From January 2013 through October 2015, AT&T's non-affiliate-billed revenues for TDM-based DS1 services declined by *more than* **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *percent*.[31] This fact alone dispositively refutes CLEC foreclosure arguments. There is simply no way the Commission could conclude that CLECs are locked into the purchase of a service that is being displaced at that pace.

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[29] Comcast, The Fastest Growing Ethernet Provider, Two Years Running (Feb. 25, 2015), http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running.

[30] Vertical Systems Group, ENS Research Program (2015).

[31] Reid Decl. ¶ 18. *See also id.* ¶ 37. This figure includes sales to AT&T affiliates; sales to non-affiliates accounts for a little more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of AT&T's DS1 sales. *See* Carlton-Israel-Shampine-Sider Decl. ¶ 26.

But beyond that, the AT&T tariffs at issue in this proceeding do not even represent a significant majority of AT&T's *DS1 sales*. In the Ameritech region, more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of AT&T's DS1 services were sold outside the tariff under investigation, and about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the DS1 services in the Pacific Bell and BellSouth regions were outside the portability plans at issue in these regions. In the Southwestern Bell region, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of services were purchased outside the pricing plan under investigation.[32] In addition, as noted, AT&T's sales of DS1 services have declined significantly since 2013.[33] And, as explained in more detail in the next section, the CLECs that do purchase service under these pricing plans typically have substantial "headroom" to move circuits to other providers without penalty.

As these data confirm, the implication running throughout the *Designation Order* – that the tariffs under investigation represent a substantial portion of the market – is simply false. In fact, the AT&T pricing plans at issue account for well below 10 percent of the total special access marketplace in AT&T's in-region territory.[34] The Commission's own preliminary estimate in the *Designation Order* is that, according to the 2013 data collection, TDM-based services comprised about 60 percent of special access revenues as of the end of 2013, with non-ILECs accounting for more than 33 percent of those revenues. The TDM services sold by ILECs, therefore, would have accounted for only about 40 percent of the special access marketplace even in 2013. The DS1 services at issue here, however, account for only about

[32] Reid Decl. ¶ 21.

[33] Reid Decl. ¶ 18.

[34] Carlton-Israel-Shampine-Sider Decl. ¶¶ 12, 21.

[BEGIN HIGHLY CONFIDENTIAL] ■ **[END HIGHLY CONFIDENTIAL]** of AT&T's total TDM-based revenues, and the tariff pricing plans under investigation account for only about **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY CONFIDENTIAL]** of AT&T's DS1 sales – which means that the portion of special access revenues subject to this investigation represents at most about 10 percent of total special access revenues. But that 10 percent figure is significantly inflated, because it is based on the 2013 data, which do not account for the dramatic shift from TDM-based services to Ethernet services over the last two years.[35]

In short, the reality is that the vast and growing majority of AT&T's sales of special access services (TDM-based DS1, UNEs, and Ethernet) are *not* purchased under the tariff pricing plans under investigation in this proceeding. Accordingly, as a threshold matter, the four AT&T tariffs at issue simply do not account for enough of the available demand in the marketplace to allow a strategy of market foreclosure.[36]

B. The CLEC Allegations At The Heart Of The *Designation Order* Misapprehend The Nature and Purpose of the AT&T Pricing Plans At Issue And How Customers Use Them.

The *Designation Order* also repeatedly suggests that the AT&T tariffs at issue require a customer to commit to purchase a certain percentage of its historical or existing AT&T DS1 purchases from AT&T in order to obtain discounts off of AT&T's month-to-month rates.[37] The resulting assumption – *i.e.*, rate discounts are conditioned on the "percentage commitment" – is

[35] *Id*.

[36] Carlton-Israel-Shampine-Sider Decl. ¶¶ 12, 21-34.

[37] *See, e.g., Designation Order* ¶ 38 (tariffs "at issue in this investigation" contain "discounts based on a percentage of a customer's purchase levels"); *id.* ¶ 19 n.54 (tariffs at issue require a customer to purchase a percentage of its initial purchases "in exchange for a discount specified in the tariff").

an important foundation of the allegation that special access demand is "locked in" by these tariffed plans. *But that is not how the AT&T tariffs at issue work.*

1. The Nature and Purpose of the AT&T Plans.

The only rate discounts offered in AT&T's special access tariffs are *term* discounts. In each of AT&T's four regions, AT&T offers a series of pure term-discount plans, which are not at issue in this proceeding. No volume commitments are required to obtain these discounts.[38] Further, the term plans offered by AT&T in each region have various durations, generally ranging from one to a maximum of five, six, or seven years, but with the bulk of the discounts beginning at the three-year term.[39] If a customer cancels a circuit before the term ends, these tariffs impose an "early termination liability" ("ETL").[40] These types of term plans have been very common in the industry for decades. Indeed, as explained in more detail below, the complaining CLECs offer similar term discount plans, which have ETLs that are comparable to and in some cases higher than AT&T's.[41]

At the behest of their customers, AT&T's various LEC subsidiaries have also filed tariffs that offer an optional "portability plan." Although the *Designation Order* refers to these plans as "percentage commitments," that is a misnomer; the AT&T tariffs at issue are really "ETL avoidance plans." That is, the portability plans presuppose that the customer has already made a commitment – a term commitment – for the circuits it has chosen to purchase. Recognizing that a CLEC may want increased flexibility to cancel and move DS1 circuits as it responds to competition and manages its retail customer base, the portability plans enable the CLEC to

[38] Reid Decl. ¶ 7 & Exhibit A.

[39] Reid Decl., Exhibit A. *See also* AT&T's Narrative Responses to Tables I-XI at pp. 1-5 (provided as Attachment 4.C to AT&T's Direct Case).

[40] Reid Decl. ¶ 7 & Exhibit A.

[41] Declaration of Parley Casto ¶¶ 15-20 ("Casto Decl.") (attached hereto as Attachment 3).

escape these term commitments, and avoid the ETLs, so long as the CLEC continues to purchase an established amount of the CLEC's existing term-plan circuits. The quid pro quo for this increased flexibility is an assurance (in the form of potential shortfall liability) that limits the number of circuits that can be moved off of AT&T's network before the term commitment for those circuits have been satisfied. These portability plans do not provide for greater rate discounts and may be chosen regardless of how many circuits the customer has.

Reflecting their independent histories, the LEC subsidiaries' tariffs accomplish these objectives in slightly different ways:[42]

- Ameritech offers a base term discount plan, called the Optional Payment Plan ("OPP"),[43] which is not at issue here, and a separate term-plus-portability plan called the Discount Commitment Program ("DCP").[44] The DCP has been in place since December 1992.[45] The DCP has its own term discounts (which are slightly smaller than the OPP) and a portability plan in which the customer agrees to maintain a "Commitment Level" equal to 90% of the customer's in-service local distribution channels.

- BellSouth offers a base term discount plan, the Channel Services Payment Plan ("CSPP"),[46] which is not at issue here, and a separate term-plus-portability plan called the Area Commitment Plan ("ACP"). The ACP has been in place since August 1993.[47] The ACP portability plan requires a volume commitment, but the size of the volume commitment is entirely up to the customer. Thus, the ACP is not really a "percentage commitment" plan at all. The ACP customer may disconnect as many circuits at it likes as long as it maintains the commitment

[42] Full descriptions of each of these tariffs with citations to the specific tariffs are provided in Reid Decl. Ex. A.

[43] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.10.

[44] *Id*. § 7.4.13.

[45] Transmittal No. 684, Ameritech Operating Companies, Tariff F.C.C. No. 2 (Dec. 21, 1992); *see id.* (Description and Justification) ("Customers have requested a time commitment plan which is not circuit specific but is instead based on a service commitment level. This program will allow customers to move Local Distribution Channels within a state and maintain discounted rates").

[46] BellSouth Telecommunications LLC, Tariff F.C.C. No. 1, § 2.4.8(A).

[47] Transmittal No. 140, BellSouth Telecommunications, LLC, Tariff F.C.C. No. 1 (Aug. 31, 1993).

level. If the number of in-service rate elements under the ACP falls below the chosen commitment level, a shortfall charge will apply.[48]

- The Southwestern Bell and Pacific Bell regions have the DS1 Term Payment Plan ("TPP"),[49] which has been in force since 2003.[50] The TPP sets forth the base term-discount plans and adds an optional portability plan, which establishes a region-wide Commitment Level set at the number of DS1 Channel terminations that the customer purchased upon entering the plan. The TPP portability plan permits the customer to move circuits or disconnect as many circuits as it wants, regardless of term commitments and without incurring ETLs, as long as the customer maintains a number of in-service DS1 channel terminations within the range of 80% of the Commitment Level and below 124% of the Commitment Level.

It is important to underscore that AT&T provides at its own cost a number of important and economically valuable benefits to its customers that opt into a portability plan. AT&T agrees to forgo the ETL on a potentially large number of circuits, and also allows the customer to enjoy the lower rates associated with longer-term plans without actually honoring the full term commitment or paying the ETL. When a term-discount plan is terminated early, AT&T loses the revenues for those facilities, and even if AT&T finds a replacement buyer, AT&T must incur the costs of contracting and installing the circuit for a different entity.[51] And, because the commitment levels are calculated on a wide-area basis, the customer gains broad freedom to shift circuits around within its customer base without penalty and to target entry to particular localities.[52]

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[48] BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B).

[49] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18; Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22.

[50] Transmittal No. 2948, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 (May 2, 2003); Transmittal No. 113, Pacific Bell Telephone Company, Tariff F.C.C. No. 1 (May 2, 2003).

[51] Reid Decl. ¶ 10.

[52] Carlton-Israel-Shampine-Sider Decl. ¶¶ 49-50.

These plans thus shift a substantial portion of the risks and costs associated with prematurely disconnected circuits from the customer to AT&T. In exchange for bearing those increased risks and costs, the plans include potential shortfall liabilities, both to establish a reasonable outer boundary on the uncompensated costs AT&T will potentially bear, and to act as a contract enforcement mechanism with regard to the new, rebalanced bargain. The minimum commitment levels are set low enough to give the customer plenty of flexibility to manage a natural level of churn in its base of circuits without incurring ETLs, but not so low as to upset the overall balance of AT&T's overall special access rate structure, which includes month-to-month, term only, and term plus portability plans. But even if a customer cancels enough circuits to trigger the shortfall liability, the customer still receives the full term discounts on all of its remaining circuits subject to the term plans, and as shown below, there are additional ways in which the customer can minimize its exposure to shortfall penalties.

2. The AT&T Plans Give Customers Substantial Freedom To Move Circuits to Competitive Alternatives.

Given that these pricing plans are designed as "ETL avoidance plans," they in fact give customers considerable freedom to move their AT&T circuits to other providers. Indeed, AT&T's experience has been that customers tend to choose these portability plans only when they suit their needs. Over the history of these portability plans, customers that choose these plans typically have not incurred shortfall penalties, and when they have, the penalties have tended to be very small relative to the customer's overall purchases.[53] If these plans do not suit a customer's needs, it uses one of AT&T's many other options, such as the pure term-discount

[53] *See* AT&T's Response to Data and Information Request Table VI (provided in the CD accompanying AT&T's Direct Case).

plans, UNEs, Ethernet services, or other pricing flexibility contracts, none of which is at issue here.

Thus, for example, a number of the most prominent complaining CLECs here do not even take service under the "percentage commitment" plans. Following a series of mergers, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** does not take service under any of AT&T's "percentage commitment" portability plans,[54] while **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** does not take service under the Ameritech portability plan and has indicated that it may not renew its portability plan subscriptions for Southwestern Bell and Pacific Bell, which expire this year.[55] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[54] Reid Decl. ¶ 20.

[55] *Id*.

[redacted] **[END HIGHLY CONFIDENTIAL]**

The customers that do take service under these plans tend to have a large amount of "headroom" available, which confirms that they are not significantly constrained by the AT&T pricing plans under investigation here. Headroom refers to the difference between the number of in-service channel terminations and number of channel terminations that a customer must purchase to avoid a shortfall penalty.[56] A portability plan customer with substantial headroom can disconnect a large number of DS1 services without incurring early termination liability *or* shortfall penalties.[57] These services, therefore, can be readily migrated to competitors or to other services. For the period under investigation (2012-2014), **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** all had average headroom of 20 percent or higher (indeed, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** enjoyed headroom as high as 39% under the Ameritech DCP) – that is, the number of DS1 channel terminations they actually purchased was 20 percent or more above the levels that would trigger shortfall penalties. Similarly, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** enjoyed headroom under their various portability plans ranging from three percent to 26 percent.[58] Overall, the average headroom for all subscribers to AT&T's portability

[56] *Id.* ¶ 22.

[57] *Id.*

[58] In addition, Mr. Reid points out, these metrics understate the flexibility available to these customers. Reid Decl. ¶¶ 25-32. For example **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** can choose to move all of its circuits from the portability plans when they expire later this year. *Id.* **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id.*

plans in the Southwestern Bell, Pacific Bell, and Ameritech regions ranged from about 10 percent to 27 percent from 2012-2014.[59]

But even plan subscribers that have exhausted their headroom have still been able to move their AT&T circuits to competing providers. The most dramatic example is the wireless industry, which has all but competed its transition from TDM to Ethernet services. Until recently, Sprint used TDM circuits purchased from AT&T and other ILECs to meet its wireless backhaul needs.[60] Sprint frequently complained in the special access proceeding that the types of tariffs at issue here were preventing it from transitioning those circuits to Ethernet service.[61] Notwithstanding those complaints, Sprint has since migrated essentially all of its TDM-based DSn wireless backhaul circuits to Ethernet, and it uses a wide range of competitive providers, including cable companies and CLECs, for those services.[62] During this process, Sprint was able to reduce its commitments under the AT&T tariffed plans being investigated in this proceeding

[59] Reid Decl. ¶ 22, Table 1.

[60] *E.g.*, Reply Comments of Sprint Nextel Corp., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 12 (filed Aug. 15, 2007) ("Sprint Nextel purchase[s] nearly all of its wireless backhaul from incumbent LECs."); Declaration of Parley Casto (July 9, 2011) (noting that Sprint "has lagged behind other carriers in making the Switch to Ethernet backhaul facilities" but was "now in the process of upgrading its facilities and migrating its backhaul circuits to Ethernet").

[61] Comments of Sprint Nextel Corp., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 24 (filed Aug. 8, 2007) (asserting that AT&T and Verizon "induce customers to enter into service arrangements that effectively prevent them from migrating traffic from BOC special access services to their own facilities or those provided by competing suppliers"); Reply Comments of Sprint Nextel, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 27 (filed Aug. 15, 2007) (alleging that ILEC pricing plans "are designed to 'capture' customers").

[62] Reid Decl. ¶ 30. *See also* Dan Jones, *Sprint Plots WiMax Shutdown, Backhaul Upgrade*, Light Reading, Apr. 8, 2014, http://www.lightreading.com/sprint-plots-wimax-shutdown-backhaul-upgrade/d/d-id/708596.

by taking advantage of the buy down provisions in AT&T's tariffs and accepting shortfall penalties in some cases.[63]

C. The CLECs' Foreclosure Theories Cannot Be Squared With Economic Theory.

The CLECs' claim that the AT&T tariffs at issue "lock up" so much of the available demand that there simply is not enough "addressable demand" to entice competitors to build alternative facilities.[64] As Drs. Carlton, Israel, Shampine, and Sider note, this theory is based on the "economic concept of 'foreclosure.'"[65] In the *Designation Order*, the Commission claims that "recent" economic literature addressing volume and term commitments, exclusive contracts, and loyalty discounts is potentially "relevant" and may suggest that the terms and conditions here facilitate such foreclosure.[66] To the contrary, these writings recognize that certain factual predicates, which are absent here, must be present for a contract provision to be deemed

[63] Reid Decl. ¶ 30. Similarly, T-Mobile – another past complainer – announced in 2012 that it had transitioned over 95% of its backhaul from TDM to Ethernet services *See* Tammy Parker, *T-Mobile: 95% of our backhaul is fiber*, Fierce Wireless Tech, Aug. 1, 2012, http://www.fiercewireless.com/tech/story/t-mobile-95-our-backhaul-fiber/2012-08-01; David Beren, *T-Mobile Says "Backhaul Strategy Key To A Competitive 4G Experience"*, TmoNews, Aug. 1, 2012 (quoting T-Mobile's Senior Vice President of Technology Strategy, Finance & Development regarding the advantages of Ethernet over TDM for backhaul), http://www.tmonews.com/2012/08/t-mobile-says-backhaul-strategy-key-to-a-competitive-4g-experience. *See also* Communications Daily, "T-Mobile Committed to Vigorous Pursuit of Incentive Auction Spectrum, Legere Says," Oct. 28, 2015 (quoting T-Mobile's Chief Technology Officer Neville Ray as saying T-Mobile is not concerned about a push by Sprint and others to get the FCC to clamp down on special access prices, because "[w]e resolved our backhaul problem for our cell sites several years ago . . . We embarked on a fiber-to-the-cell strategy. . . . That's been a huge help for us with our LTE rollout.").

[64] *See, e.g.*, *Designation Order* ¶ 12; *see also id.* ¶ 6 (complaining CLECs allege that AT&T's tariff pricing plans "lock up substantial portions of carrier and end-user demand, which locks out competition for such demand and consequently harms both competition and innovation").

[65] Carlton-Israel-Shampine-Sider Decl. ¶ 12.

[66] *Designation Order* ¶ 19 n.54.

anticompetitive. The economic papers cited by the Commission thus lend no support to CLEC foreclosure theories.

As Drs. Carlton, Israel, Shampine and Sider explain, there are a wide range of foreclosure models in the economic literature.[67] The Commission mentions a limited number of them in the *Designation Order*,[68] but all of these various models share some common features.[69] In particular, all of them require that for a practice to foreclose competition, both of the following must be true: "(i) the challenged practice must attract sufficient volume that rivals are deterred from entering or expanding, *and* (ii) as a result, the entity that deterred entry/expansion is able to charge higher prices in areas where competition would otherwise occur."[70] This literature further makes clear that the inefficiencies and anti-competitive effects potentially associated with such arrangements generally occur only "under only limited circumstances."[71] Those conditions are not remotely present here. Most importantly, for the reasons discussed above, the critical first premise that these commitments "serve to lock up a large percentage of the demand for these services" is simply false.[72] Far from being "locked in," demand for AT&T's non-affiliated DS1 services is shrinking rapidly, at a clip of over **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** in less than three years. And the portability plans at issue here account for only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY**

[67] Carlton-Israel-Shampine-Sider Decl. ¶¶ 56-57.

[68] *Id*. ¶ 56; *Designation Order* ¶ 19 nn.53 & 54.

[69] Carlton-Israel-Shampine-Sider Decl. ¶ 57.

[70] *Id*. ¶ 14. *See also id*. ¶¶ 57-61 (citing literature cited in the *Designation Order*). Drs. Carlton, Israel, Shampine and Sinder emphasize that "*[b]oth* of these elements – discouraging rivals' deployment of facilities and maintaining prices above competitive levels – must hold for harm to competition," and even then pro-competitive effects may outweigh any anticompetitive effects. *Id*. ¶ 14 (emphasis added).

[71] *Id*. ¶ 62.

[72] *Designation Order* ¶ 12.

CONFIDENTIAL] of AT&T's declining TDM DS1 revenues. Moreover, customers who do choose the portability option can generally move a significant number of circuits off of AT&T's network without an ETL even before their term commitment has been met, both because the very terms of the plans allow them to and because most customers have significant headroom. Beyond that, they are free to migrate even more when their plans expire because AT&T's term discounts are not volume-based and the commitments required for any renewal are not tied to historical demand. Since the portability plans expire, on average, about every three years, that gives customers an enormous opportunity to shop around for the best deal, and the facts cited herein show that they freely avail themselves of that opportunity. In short, the CLECs' foreclosure theory fails at the first step because, as Drs. Carlton, Israel, Shampine and Sider demonstrate, these AT&T tariffs represent far too small a share of the marketplace to have any impact on competition or investment incentives.[73]

Notably, in discussing the types of contracts that can raise the risk of foreclosure, the papers cited by the Commission focus on different types of contracts than AT&T's portability plans. In contrast to the hypothetical contracts discussed in the cited economic literature, AT&T's tariffs do not require a customer either to make volume commitments that reference AT&T's rivals or to deal exclusively with AT&T.[74] Rather, customers are free to give as much

[73] Carlton-Israel-Shampine-Sider Decl. ¶¶ 29-38 (calculations based on the data submitted here show that circuits "accounting for a large amount of AT&T's DS-1 sales are available to CLECs either because they (i) roll off of longer-term contracts not subject to portability commitments; (ii) are purchased under month-to-month contracts; or (iii) have available headroom under existing portability contracts and so can transfer circuits to rivals without penalties. These data thus confirm that "the portability plans under investigation in this proceeding do not foreclose CLECs from winning a large portion of the current demand for TDM-based services each year, and winning all of it every three or four years").

[74] *See* Carlton-Israel-Shampine-Sider Decl. ¶¶ 62-73. The Commission suggests that AT&T might be able to achieve the same effect through a partially exclusive contract if the victims – customers or suppliers – "expect that the exclusionary tactic will succeed" and the buyers are

business to AT&T's competitors as they please, so long as they honor the term commitments to which they have agreed with respect to a portion of the circuits subject to those commitments. But in all events, the papers cited by the Commission recognize that even exclusive dealing or "loyalty contracts" are common in competitive markets, that they are often pro-competitive.[75] and that they have anti-competitive effects only in unusual circumstances. As one of the papers notes, "normally a firm cannot use contracts with its customers or suppliers inefficiently to exclude a rival from competition, because the high price of these contracts will make this strategy unprofitable."[76] Thus, even if AT&T's tariffs did have the characteristics of an exclusive dealing or "loyalty" contract – which they do not – the CLEC theories would still flounder on the fact that AT&T's tariffs do not remotely account for enough demand to facilitate a foreclosure strategy.[77]

"unable to coordinate actions to defeat the tactic." Carlton-Israel-Shampine-Sider ¶ 69 (quoting Rasmusen, Ramseyer and Wiley, Jr., "Naked Exclusion: Reply," 90 American Economic Review at 310 (2000) (cited in *Designation Order* ¶ 19 n.54)). But as Professor Carlton explains, "under this and related models, if buyers can together signal to an entrant that sufficient demand is available to make entry profitable, then a supplier will not be able to 'buy off' customers by inducing them into entering exclusive contracts (with the effect of deterring entry)." *Id.* In the special access marketplace, CLEC fiber rings are in close proximity to many buildings, and thus "*no* coordination between customers would be necessary to attract a CLEC to construct a building-specific special access circuit from a nearby fiber loop." *Id.*

[75] Carlton-Israel-Shampine-Sider ¶¶ 61-62 (citing literature). *See, e.g.*, Benjamin Klein, "The Economics of Alternative Legal Standards for Loyalty Discounts," FTC/DOJ Workshop on Conditional Pricing Practices, June 23, 2014, p. 3 (cited in *Designation Order* ¶ 19 nn.53 & 54) ("Loyalty contracts, including contracts that include minimum distribution requirements in addition to share sales requirements, are commonly used as part of the normal competitive process when there is no possibility of exclusion.").

[76] Eric Rasmusen, J. Mark Ramseyer and John Wiley, Jr., "Naked Exclusion: Reply," 90 American Economic Review 310 (2000) (cited in *Designation Order* ¶ 19 n.54).

[77] Carlton-Israel-Shampine-Sider Decl. ¶ 73. As Drs. Carlton, Israel, Shampine and Sider explain, the Commission's apparent suggestion that "tying of sales between regions may exacerbate concerns about anticompetitive foreclosure when multimarket entry is efficient" is even more inapt. *Id*. ¶¶ 72-73 (citing *Designation Order* ¶ 19 n.54 (citing Carlton and Waldman 2002, p. 194)). "To the extent the Commission is arguing that AT&T is leveraging market

In short, none of the papers the Commission cites offers a theory under which the Commission could determine that the portability plans at issue are anticompetitive.[78] And for good reason because the widespread entry and investment that has occurred while these plans have been in effect show that competition has not been foreclosed. The Ameritech and BellSouth tariffs were filed at the height of the TDM era and have been in place for 22 years; the Southwestern Bell and Pacific Bell tariffs have been in place for more than a decade. If these tariffs had the anti-competitive foreclosure effects the CLECs claim, one would expect to see limited competitive investment and the continuing dominance of TDM services. The opposite is of course true: competitors of all types have invested billions of dollars in alternative networks and Ethernet has become the dominant technology, with the result that the DS1 services at issue here are experiencing rapidly declining sales, including within the very tariffed arrangements that are claimed to have "lock-in" effects. Given this clear marketplace evidence, there is no basis for the Commission to accept the CLECs' foreclosure claims.

II. THE TERMS AND CONDITIONS AT ISSUE ARE FULLY CONSISTENT WITH THE COMMUNICATIONS ACT.

The heart of the *Designation Order* proceeds through a series of inquiries concerning the lawfulness of various specific aspects of the four AT&T tariffs at issue. As requested in the *Designation Order*, AT&T addresses each of these specific inquiries in order, which relate to:

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power in remote areas into more competitive areas such as dense cities, AT&T cannot succeed in raising the price of special access to a customer in the dense city who has no need for AT&T special access in the remote area since AT&T has no leverage over that customer and since we have shown that rivals have a significant presence in such dense areas. Since AT&T does not discriminate in pricing to customers in dense cities, then AT&T would be unable to charge higher prices to the customers in dense cities over whom it does have market power in remote areas unless it was willing to lose all those customers that do not require services in the remote areas to rivals." *Id.*

[78] Carlton-Israel-Shampine-Sider Decl. ¶ 59 ("since there is plenty of demand available to rivals that is unencumbered by contractual restrictions related to portability, none of the cited papers are at all relevant").

(1) percentage commitments; (2) shortfall penalties; (3) upper percentage thresholds and related overage penalties; (4) term commitments; (5) early termination penalties; and (6) whether certain broadband services agreements should be tariffed. This section begins, however, by addressing the statutory standard by which those issues, and the AT&T tariffs here, must be considered.

A. Arguments that Discount Plans are Unlawful Face A Very High Bar.

Notably absent from the *Designation Order* is a discussion of the legal *standard* the Commission should apply in determining whether the tariffed terms at issue might violate Sections 201(b) or 202(a) of the Act. The Commission merely notes that it has "expressed concern" in the past that ILECs could "potential[ly]" use the terms and conditions of their special access tariffs to harm competition.[79] In fact, the overwhelming weight of authority makes clear that discount plans such as these are generally permissible and pro-competitive, and that those arguing to the contrary face a very high bar.

To begin with, the Commission has held repeatedly that term and volume commitments are typically pro-competitive and, specifically, that they are appropriate for the pricing of special access services.[80] Contrary to the Commission's suggestion, these prior Commission findings are fully consistent with antitrust law.[81] As the Supreme Court has held, "[l]ow prices benefit

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[79] *Designation Order* ¶ 19.

[80] *See, e.g.*, Report and Order, *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C. 2d 923, ¶ 40 (1984) ("[g]reater pricing flexibility in volume discounts may benefit large as well as small users, not injure competition, and not be discriminatory."); Fourth Memorandum Opinion And Order On Reconsideration, *Transport Rate Structure and Pricing*, 10 FCC Rcd. 12979, ¶ 13 (1995) (*citing Expanded Interconnection Order*, 7 FCC Rcd. 7369, ¶ 199 (1992)) ("both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships"); Third Report and Order, *Access Charge Reform*, 11 FCC Rcd. 21354, ¶ 187 (1997) (volume and term "discounts should be permitted . . . because they encourage efficiency and full competition").

[81] *Cf. Designation Order* ¶ 19 n.53.

consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."[82] Further, the Commission has specifically emphasized that discount plans are pro-competitive where there is no threat of below-cost predatory pricing,[83] and no party here has alleged that AT&T is attempting a predatory pricing strategy. Instead, the CLECs are arguing that they have no choice but to purchase TDM DS1 circuits pursuant to pricing plans that require certain volume commitments and that those volume commitments are foreclosing competition. Not only, for the reasons discussed above, is this argument belied by marketplace facts, which demonstrate that CLECs can and do choose alternative pricing plans and that the plans at issue do not foreclose competition, it is also flatly inconsistent with D.C. Circuit precedent.

Indeed, the one time the Commission purported to find that an optional discount plan was anticompetitive, the D.C. Circuit reversed the Commission's conclusions as arbitrary and capricious without even reaching the statutory issue. In that order, the Commission concluded that BellSouth violated a nondiscrimination requirement of Section 272 by adopting a tariff provision that provided a particular level of discounts to special access customers that maintained at least 90% of their prior purchase volumes with BellSouth. The D.C. Circuit vacated the Commission's order and held that such discount plans are "most naturally viewed as

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[82] *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). Indeed, as then-Judge Breyer once explained, antitrust authorities only rarely discourage rate discounts: a firm's above-cost price cut "is almost certainly moving price in the 'right' direction (toward the level that would be set in a competitive marketplace)," and sound antitrust policy thus "very rarely reject[s] [such] beneficial 'birds in the hand' for the sake of more speculative (future low-price) 'birds in the bush.'" *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983); *see also BellSouth* v. *FCC*, 469 F.3d 1052, 1055-60 (D.C. Cir. 2006).

[83] *Pricing Flexibility Order* ¶ 80.

a bargain containing terms that both benefit and burden its subscribers."[84] The court specifically recognized that no incumbent LEC is required to offer such discounts at all, that no customer is forced to purchase services under these programs, and that when customers do so, it is the result of their "free choice."[85] On this basis, the Court concluded that no existing customer had a cognizable claim to have been made worse off by agreeing to the 90 percent requirement, and the provision therefore could not have discriminated against any customer.[86] And although it did not reach the statutory issue, the court expressed doubt that Section 272 could be read to require the "inefficiencies" of "frustrating the Bell Operating Companies' attempts to maintain stable utilization rates on their networks or to lower their prices."[87]

These precedents establish an extraordinarily high bar for the CLECs' claims that AT&T's portability plans are unlawful. The Commission cannot find these terms and conditions unlawful unless it can make – and *defend* on this record – findings that such terms have resulted in clearly identifiable competitive harms on the specific facts of this case. No such showing can come close to being made as to any aspect of the four AT&T tariffs at issue.

B. The "Percentage Commitments" Are Lawful Under Sections 201(b) and 202(a) (¶¶ 30-71)

The first and principal issue the Commission designates for investigation is whether "the use of percentage commitments in certain tariff pricing plans based on a relatively high proportion of a customer's historical or existing (at point of entry into plan) level of purchases, either by themselves or in concert with other pricing plan provisions," violates Sections 201(b)

[84] *BellSouth* v. *FCC*, 469 F.3d 1052, 1055-60 (D.C. Cir. 2006).

[85] *BellSouth*, 469 at 1055-60.

[86] *Id.*

[87] *Id.*

or 202(a).[88] The Commission describes these "percentage commitment" plans as "the heart of [the] Competitive LECs' concerns"[89] and devotes almost half of the *Designation Order* to a discussion raising six interrelated sets of issues relating to such plans.[90] But the core premise underlying these purported concerns is that these tariff plans "lock up" special access demand to a degree that impedes competition, and that premise, at least as applied to AT&T, is simply wrong.

***Volume vs. Percentage Commitments* (¶¶ 38-40) *and Explanation of Commitment Level* (¶ 67)**. The *Designation Order* begins with the CLECs' argument that the "percentage commitments" here are "fundamentally different from classic volume discounts."[91] A true volume discount, the CLECs say, "would typically be based on the absolute number of services purchased or dollars spent . . . and would therefore reflect scale economies."[92] The discounts here, by contrast, are allegedly "based on a percentage of a customer's purchase levels," with the result that "the same percentage discounts apply to customers with larger and smaller purchase levels, leading to a wide disparity in quantity of circuits associated with a given discount and suggesting that discounts do not reflect scale economies."[93] The Commission further asserts that incumbent LECs "defend the high percentage purchase commitments in their pricing plans as legitimate volume discounts" but have never addressed the CLECs' argument concerning the

[88] *Designation Order* ¶ 30.

[89] *Id.* ¶ 12.

[90] There is in fact a seventh set of issues, seeking comment on so-called "all or nothing" plans, *see id.* ¶ 61, but AT&T does not offer any such plans and therefore submits no direct case addressing such plans.

[91] *Id.* ¶ 38.

[92] *Id.*

[93] *Id.*

"distinction between traditional volume discounts based on commitments to purchase an absolute quantity or dollar amount and those based on percentage purchase commitments."[94]

The CLECs' criticisms do not apply to the AT&T tariffs at issue. As explained above, the only *rate* discounts that AT&T offers are *term* discounts, which no one has ever claimed must be justified under a scale economy rationale. AT&T offers those rate discounts on a circuit-by-circuit basis and they depend solely on the term the customer chooses for that circuit. In all four AT&T regions, a customer will receive the term discount it has chosen for any given circuit regardless of the total number of circuits the customer has purchased.[95]

Although AT&T's term plans require no volume commitment, a volume commitment of sorts is required if the customer elects the portability option with its term plan.[96] In that situation, AT&T allows the customer to prematurely disconnect circuits purchased under a term plan, without early termination liability, so long as the customer agrees to a shortfall penalty if the percentage of circuits it prematurely moves off of AT&T's network exceeds a certain level. The volume commitment is thus a backstop to the customer's ability to break its term commitment without penalty, and the shortfall penalty is the consideration AT&T obtains in exchange for foregoing ETLs and incurring additional expense when the customer prematurely moves or disconnects circuits. As noted above, the minimum commitment levels are set low enough to give the customer plenty of flexibility to manage a natural level of churn in its base of

[94] *Id.*

[95] To the extent that the CLECs are suggesting that AT&T is required to offer volume discounts, the D.C. Circuit has squarely rejected any such notion. *BellSouth Telecommunications Inc.* v. *FCC*, 469 F.3d 1052, 1057 (D.C. Cir. 2006).

[96] *See* Reid Decl. Ex. A (describing the volume components of the AT&T portability plans). As noted above, BellSouth's ACP plan does not contain any "percentage" commitments at all, because the customer chooses how many circuits it will place in the portability plan.

circuits without incurring ETLs, but not so low as to upset the overall balance of AT&T's special access rate structure and the expectations of customers that do not choose the portability plans.

Giving customers the option of obtaining added flexibility in this manner when they sign up for term discounts is fully consistent with section 201(b). Because AT&T is forgoing ETLs that would otherwise apply under a term-plan agreement and incurring other uncompensated costs on behalf of the customer, it is perfectly appropriate to ask the customer to provide additional assurances (in the form of shortfall penalties) to limit the magnitude of those risks and costs. And even if the customer cancels enough circuits to trigger the shortfall penalties, the customer will continue to receive the term discounts on all of its active circuits.

Nor are the percentage commitments unreasonably discriminatory under Section 202(a).[97] Contrary to the premise of the CLECs' argument, the more circuits a customer has purchased from AT&T or chooses to place in the portability plan, the greater the benefit the customer obtains under the portability provisions. AT&T assumes greater risks and costs for a customer that has a large number of circuits in a portability plan than for one that has a small number of circuits. Although nothing in the statute requires AT&T to maintain volume-related terms in which the benefits scale linearly,[98] the "percentage commitments" here do in fact ensure that the relative balance of benefits and risks remain in the same proportion whether the customer has a large or a small amount of circuits in the portability plan.

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[97] *See Designation Order* ¶ 39 (quoting Cbeyond arguing that it is unreasonably discriminatory that "two customers that purchase the same percentage of their historic levels from the ILEC receive the same percentage discount or other benefits even if the numbers of circuits that they purchase are vastly different" (italics omitted) (citation omitted)).

[98] *See, e.g.*, *BellSouth*, 469 F.3d at 1057 (incumbent LECs have "no obligation to offer a volume discount plan at all, much less a linear plan").

***Impact on Competition* (¶¶ 41-45)**. The Commission also repeats CLEC arguments that percentage commitments "limit competition in the provision of business data services."[99] These CLEC claims, quoted throughout this section of the *Designation Order*, are full of hyperbole. The CLECs' argument is that the "vast majority of large buyers" are subject to the commitments, which means that effective competitors cannot even "emerge," because there is a "far smaller addressable market for existing or potential alternative wholesale providers than would otherwise be the case."[100] Because potential purchasers have "such a large percentage of their needs locked up" in these agreements, competition is impeded throughout the "multi-billion dollar special access market."[101]

As discussed above, the record evidence does not remotely support any of these claims. First, it is not true that the "vast majority" of demand is subject to AT&T's percentage commitments. As explained above, the four AT&T tariffs at issue account for a small percentage of AT&T's total special access sales, and no more than 10 percent of the total special access marketplace in these AT&T regions. Indeed, AT&T's DS1 revenues have dropped by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** just since 2013, and its portability plans account for only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of its rapidly shrinking base of DS1 revenues. CLEC rhetoric notwithstanding, the four AT&T tariffs at issue represent a small and declining portion of the available demand that could not materially affect the "addressable" market for entry and investment.[102]

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[99] *Designation Order* ¶ 41.

[100] *Id.* ¶¶ 41-42.

[101] *Id.*

[102] Carlton-Israel-Shampine-Sider Decl. ¶ 22.

CLEC claims of foreclosure are further belied by the fact that competitors have, in fact, entered the market and invested in alternative facilities on a massive scale. Even though these tariffs have been in place more than a decade (and in the case of Ameritech and BellSouth, more than two decades), these pricing plans have not stopped the massive investment, including in Ethernet services, that have TDM DS1 services on a path to extinction. As Drs. Carlton, Israel, Shampine, and Sinder explain, the widespread deployment of CLEC fiber networks in recent years undermines Complainants' fundamental assertion that the AT&T tariffs at issue, which were first introduced many years ago, have "locked up" sufficient demand to limit the competitive presence of rivals.[103]

Indeed, far from foreclosing competition and investment, the portability option that AT&T makes available to CLECs affirmatively *promotes* competition. By limiting the application of ETLs when customers prematurely move or terminate circuits subject to a term plan, the plans greatly expand the customer's ability to move circuits to alternative providers.[104] As explained above, in AT&T's experience customers that choose a portability plan are generally able to maintain considerable headroom. Because the available headroom under the portability options is large relative to existing CLEC volumes, this option on balance makes it

[103] *Id*. ¶ 39; *see also id*. ¶ 40 ("To the contrary, over this period CLECs have deployed fiber rings in a large number of metropolitan areas that, by design, are intended to maximize proximity to large numbers of customers and facilitate the ability of CLECs and their customers to provide retail services to end users in nearby buildings"). Moreover, because AT&T does not charge different rates for different locations within an MSA, the intense competition for buildings with large amounts of business provides a competitive constraint for all DS1s throughout an MSA, and thus there is no plausible basis to conclude that AT&T's tariffs have any anticompetitive effect on special access prices. *Id*. ¶ 73.

[104] By contrast, the contracts under which AT&T purchases special access services from other CLECs contain only term discounts with early termination liability, without the flexibility of a portability option. Casto Decl. ¶ 16.

easier, not harder, to move circuits to competitors. And, of course, customers are free to terminate their use of the plan or reset their commitment level when their term expires.

Other facets of AT&T's portability plans further underscore their pro-competitive impact. For example, because commitments are made on a region-wide (or state-wide) basis, special access customers can focus their permitted volume reductions in specific geographic areas (*e.g.*, in a particular MSA). This feature of AT&T's portability plans make them "particularly unsuitable for locking up local demand," because "a large customer that takes the portability option can dedicate *all* of its headroom across all of AT&T's region to sponsoring entry in any geographic locale in that region it wishes."[105]

The CLECs attempt to turn this feature of the plans on its head, arguing that the geographic scope of these plans enable ILECs to "effectively lock up demand not only in areas where the price cap LECs provide the only facilities-based option . . . but extend into those areas where other providers do have network facilities."[106] They claim that the effect is to exclude wholesale competitors from the market.[107] Scratch beneath the surface and this argument makes no sense. As Drs. Carlton, Israel, Shampine and Sider note, most special access demand is concentrated in densely populated areas where competition is most intense.[108] Even assuming there are other areas where competition is less intense, a firm could not leverage any market power it might have in those other areas unless those other areas account for a substantial volume

[105] Carlton-Israel-Shampine-Sider Decl. ¶¶ 50-51.

[106] *Designation Order* ¶ 31 (quoting XO Sept. 23, 2015 *Ex Parte* Letter at 3).

[107] *Id.* ¶ 33. *See also id.* ¶ 19 n.54 (citing Dennis Carlton and Michael Waldman, "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," Rand Journal of Economics, Vol. 33, No. 2, Summer 2002).

[108] Carlton-Israel-Shampine-Sider Decl. ¶ 75.

of purchases, which is simply not the case.[109] There is no plausible basis to conclude that a firm can leverage market power in areas that account for a very small fraction of demand into the areas where the great majority of the demand is.[110]

Tellingly, the discussion of this issue in the *Designation Order* is filled with wild, unsupported CLEC allegations that are implausible on their face and in all events cannot be tested against the limited, ILEC-only data the Commission has requested in this proceeding. For example, the Commission quotes a 2012 Level 3 letter as saying that ILEC discounted rates are "almost ubiquitously . . . dramatically higher" than competitors' rates, and XO goes so far as to claim that competitors' prices are "often as much as 40-60 percent less" than the incumbent LEC's discounted rates.[111] But the Commission has not initiated a section 205 investigation of special access rates, and it has not even sought data from CLECs to permit a rate comparison, so these generalized and undocumented claims about unspecified rates prove nothing. What *is* relevant, on the other hand, is that both Level 3 and XO have abundant freedom under the pricing plans at issue to move circuits to other providers, so their lock-in claims are wholly lacking in credibility.[112]

***Impact on Investment and Deployment* (¶¶ 46-47).** The *Designation Order* also repeats CLEC claims that "percentage commitments" impede the CLECs' deployment of their own facilities to buildings.[113] This section of the *Designation Order* includes a mish-mash of different CLEC claims, none of which is consistent with the facts.

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[109] *Id*.

[110] Carlton-Israel-Shampine-Sider Decl. ¶ 75.

[111] *Designation Order* ¶ 45.

[112] Carlton-Israel-Shampine-Sider Decl. ¶¶ 24-38.

[113] *Designation Order* ¶ 46.

First, any claim that the CLECs cannot deploy their own facilities because the CLECs themselves are "locked into" purchasing inputs from AT&T is false for the reasons stated above. Although CLECs would undoubtedly prefer to obtain the discounted rates available from term plans without having to make any term commitment, there is no factual, economic or legal basis to justify a conclusion that the percentage commitments in AT&T's portability plans are impeding investment or deployment. In that regard, it is no small irony that most of the CLEC allegations in this section come from letters Level 3 filed in 2012 alleging that it would construct fiber to many more buildings if it were not for "AT&T's (and the other price cap LECs') lock-up arrangements."[114] As explained above, legacy Level 3 **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** – so those tariffs cannot be hindering legacy Level 3 from constructing connections to buildings.

Second, to the extent Level 3 and others are claiming that they cannot build connections because their potential end user customers are "locked in" to AT&T, that claim also is false. As noted above, the tariffs at issue here apply only to TDM-based DS1 services, so these tariffs cannot, by definition lock in DS3, OCn, SONET, or any Ethernet services. But more importantly, retail customers rarely use the AT&T portability plans at issue (*see* Table III response to data requests), so virtually none of those customers could be "locked up" by these tariffs. Here, again, the CLEC argument has no grounding in fact.

Unable to support their claims with facts, the CLECs serve up unverifiable and ultimately pointless anecdotes. For example, the Commission quotes a Level 3 claim that it had a potential

[114] *Id.* (quoting Level 3 June 27, 2012 *Ex Parte* Letter at 5).

customer "that could have saved $65,000 annually by moving to Level 3" but which allegedly purchased services from "incumbent LECs under lock-up plans" that prevented it from doing so.[115] But neither the Commission nor Level 3 provides any details or support for this anecdote. And even if they had, the claim would, at most, show that a particular customer that had committed to a term plan was subsequently constrained in its ability to change its mind and switch to Level 3. That's hardly a remarkable proposition given that pure term plans are not at issue here, much less one that could justify the invalidation of plans that give customers *increased* ability to avoid ETLs. But in all events, it is highly unlikely that this hypothetical retail customer was purchasing services under any of the AT&T portability plans because, as noted, retail customers do not typically purchase TDM-based DS1s under those plans.

***Voluntary or Involuntary Nature of Offerings* (¶¶ 48-49).** The CLECs also claim that "as a practical matter" they have no choice but to take service under the percentage commitment tariffs.[116] In describing these claims, the *Designation Order* again relies entirely on CLEC hyperbole: incumbent LECs have "overwhelming control" of the last mile and can thus "dictate terms," and because CLECs have "no choice but to enter" such a percentage commitment plan, "buyers typically maintain their commitments at the same high levels, even at contract renewal."[117] The *Order* itself asserts that "[g]iven the importance of circuit portability to competitive LECs, it appears that most, if not all of them elect that option when purchasing special access services from incumbent LECs."[118]

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[115] *Id.* ¶ 47 (quoting Level 3 Sept. 23, 2015 *Ex Parte* Letter at 5).

[116] *Id.* ¶ 48.

[117] *Id.* ¶¶ 48-49 & n.151 (quoting Windstream Sept. 24, 2015 *Ex Parte* Letter at 4, tw telecom June 5, 2012 *Ex Parte* Letter, and Sprint Feb. 11, 2013 Comments at 25).

[118] *Id.* ¶ 34.

Once again, the actual facts are to the contrary. As explained above, in areas where they do not build their own facilities, carriers purchase a wide variety of services to meet their wholesale needs, including Ethernet, UNEs, and DS1s under tariffs that do not include percentage commitments.[119] Further, the four AT&T tariffs that have "percentage commitments" represent only a small fraction of CLEC purchases; indeed, they represent only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's rapidly declining sales of DS1 services. Thus, contrary to the CLEC rhetoric, customers do not face a binary choice between AT&T's month-to-month DS1 rates and the portability percentage commitments.[120]

Nor is there any validity to the claim that CLECs have no choice but to renew the portability option each time it expires, as the record here contains numerous instances of customers choosing not to renew. Remarkably, in citing these claims, the Commission points to comments filed by Sprint in February 2013.[121] But Sprint has since refuted its own argument by moving virtually all of its wireless backhaul needs to Ethernet service and exiting AT&T's DS1 portability plans in the process.[122] It should go without saying that Sprint could not done that if it was "locked into" those plans. Similarly, the Commission quotes twt for the proposition that CLECs have "no choice" but to remain in portability plans, but as explained above, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[119] Carlton-Israel-Shampine-Sider Declaration ¶¶ 16-18.

[120] *Designation Order* ¶ 48 (quoting Level 3 Jun. 27, 2012 *Ex Parte* Letter at 14).

[121] *Id.* ¶ 48 (quoting Sprint Feb. 11, 2013 Comments at 25).

[122] *See* Reid Decl. ¶ 30.

[redacted][3] **[END HIGHLY CONFIDENTIAL]**

The Commission's further suggestion that portability is "a crucial non-rate benefit for competitive LECs serving retail customers whose terms of service rarely coincide with the competitive LECs' underlying pricing plan term commitments with incumbent LECs" is also incorrect.[124] AT&T offers a wide range of term commitments (*e.g.*, 1, 2, 3, 4, 5 or 7 years, or specified numbers of months between 24 and 72), with the bulk of the discounts beginning with the three-year term.[125] There is no evidence that special access customers' own terms of service do not coincide with at least one of the terms offered in almost any marketplace scenario, and it is exceedingly implausible that that would not be the case.[126] Indeed, the complaining CLECs have previously indicated that they often have longer-term commitments – *e.g.*, three years or more – for their own retail services.[127] In addition, neither the CLECs nor the *Designation Order* suggests any reason why these types of retail contracts could not be matched with similar

[123] *Id*. ¶ 25.

[124] *Designation Order* ¶ 34; *see also id.* ¶ 96 ("Competitive LECs contend that competitive pressure in the retail market precludes retail contracts of equal length to those in incumbent LECs' pricing plans they must purchase under to obtain an input price that will allow a competitive retail price.").

[125] Carlton-Israel-Shampine-Sider Decl. ¶ 52 (Midwest – 1, 2, 3, 4 or 5 years; West or Southwest – 1, 2, 3, 5 or 7 years; East – 1, 3 or 5 years; and Southeast – 24-72 months).

[126] *Id*.

[127] *See* Reply Declaration of Dennis W. Carlton and Allan L. Shampine, WC Docket No. 05-25, Mar. 12, 2013, ¶ 26 ("Carlton & Shampine Reply Declaration") (tw telecom "reports that more than sixty percent of its revenues come from three year or longer contracts" and XO reports that terms for retail customers are "on the order of three years"). *See also* Zayo Group, LLC, Investor Presentation, May 2015, at 13, *available at* http://investors.zayo.com/~/media/Files/Z/Zayo-IR/documents/zayo-deck-3q15-v3.pdf (providing data on the average length of new contracts).

duration contracts with AT&T for special access service without the need for portability.[128] And, in all events, by limiting this investigation to information provided by ILECs, the Commission is in no position to provide the necessary level of scrutiny to CLEC claims that they are unable to match their wholesale term commitments with the needs of their retail customers.

***Impact on Ability to Shift Purchases* (¶¶ 50-53).** The CLECs also claim that the percentage commitments, coupled with shortfall penalties, "have made it impractical to shift significant volumes of purchases away from the incumbent LECs' tariff pricing plans."[129] That claim is also false. As discussed above, in the vast majority of cases competing carriers are purchasing services from AT&T without any percentage commitment at all, including Ethernet, UNEs, or DS1s under other tariffed arrangements. Moreover, even those CLECs that have opted into a portability plan have substantial "headroom" to move circuits to other carriers without any penalty.

The *Designation Order* asserts that CLECs "dispute this characterization," but the complaining CLECs that have taken service under the portability plans do not dispute the fact that they have substantial headroom or that they can take advantage of that headroom and switch a large number of circuits to other providers at any time, whether the plan is expiring or not. Rather, they argue that they are unable to migrate very many circuits when the portability plans *expire*.[130] This too is simply wrong. When an AT&T portability plan expires, the CLEC is free

[128] Carlton-Israel-Shampine-Sider Decl. ¶ 52.

[129] *Designation Order* ¶ 50 (quoting BT Americas saying "once a competitor agrees to a volume commitment . . . it is virtually impossible for the competitor to shift any of its committed special access demand to an alternative provider").

[130] *Id.* ¶ 52 (quoting BT Americas saying that moving volumes to entrants is "rarely, if ever, a realistic option," and that at "best, a competitor could only attempt to shift a subset (likely a small subset) of its demand to an alternative wholesale provider and keep the remaining portion of its demand in service with the incumbent LEC under a new purchase arrangement").

to renew or not renew the plan, but to the extent it does renew, it is not constrained by its prior purchase volumes. Rather, it is free to migrate as much traffic as it pleases; the new percentage commitment does not relate to historic purchase volumes, but to the reset level of purchase volumes. And CLECs do, in fact, reset their commitment levels when they renew portability plans.

***Impact on the IP Transition* (¶¶ 54-60).** Finally, the CLECs claim that the terms of the AT&T tariffs at issue "force purchasers to continue buying TDM services, limit competitors' (and incumbents') ability to migrate DSn services to Ethernet services, and inhibit competitive deployment of and competition for IP-based services generally."[131] In particular, the CLECs complain that incumbent LEC tariffs "do[] not allow, or unreasonably limit[], the ability of competitive LECs to count Ethernet business data services purchases from the incumbent LECs toward fulfillment of their TDM-based DS1 and DS3 channel termination percentage commitments."[132]

The short answer, once again, is that the AT&T tariffs at issue obviously are not deterring massive investment in Ethernet alternatives. As explained above, Ethernet services have experienced massive growth over the last several years, and as a result the DS1 services at issue here are in rapid decline. Moreover, many of the very CLECs that are complaining here are leading providers of Ethernet services.[133] Accordingly, there is simply no basis to conclude that these tariffs are foreclosing the development and deployment of Ethernet.

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[131] *Designation Order* ¶ 54.

[132] *Id.* ¶ 56.

[133] Indeed, Level 3 is the second largest provide of Ethernet services in the country. *See* Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD, (Aug. 24, 2015), http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

C. AT&T's Shortfall Penalties Are Lawful Under Section 201(b) (¶¶ 72-78)

The Commission also designates for investigation whether "the use of shortfall fees in certain incumbent LEC tariff pricing plans, either by themselves or in conjunction with other pricing plan provisions (such as percentage commitments) is a just and reasonable practice under section 201(b)."[134] AT&T's shortfall provisions are lawful, and none of the CLEC criticisms cited or quoted in the *Designation Order*, establish any basis to find that those shortfall provisions constitute an unreasonable practice.[135]

First, the question to be investigated again mischaracterizes the AT&T tariffs at issue. The *Designation Order* defines the shortfall fees to be investigated as "charges assessed on a purchaser under special access tariff pricing plans if a buyer's purchases fall below the percentage commitment level it must meet to *obtain the pricing plan's discount*."[136] However, none of the AT&T tariffs at issue impose percentage volume commitments as a condition of obtaining the pricing plan's discounts.[137] Rather, the percentage commitment relates only to the optional portability plans, which are designed to permit the avoidance of existing ETLs. Further, even if a customer that has subscribed to a portability plan cancels a large number of circuits and thereby incurs a shortfall penalty, that customer will continue to receive the same term discounts on all of its remaining circuits.

The shortfall penalties represent the necessary *quid pro quo* for the *separate* agreement to provide the customer with the ability to avoid ETLs. As explained above, the portability plan in

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[134] *Designation Order* ¶ 72.

[135] The computation of shortfall penalties is discussed in the attached declaration of Mr. Reid, at Exhibit A (Attachment 1 to AT&T's Direct Case). *See also* AT&T's Narrative Responses to Tables I-XI at pp. 1-4 (Attachment 4.C to AT&T's Direct Case).

[136] *Designation Order* ¶ 72 (emphasis added).

[137] *See id.* ¶ 72 n.204.

effect rebalances the relative risks and costs to be borne by the parties for premature cancellation of circuits subject to term plans, and it does so by placing greater risk and costs on AT&T. Under AT&T's portability plans, AT&T agrees not to impose ETLs for a potentially large number of canceled circuits, it loses the revenues associated with the canceled facilities, and even if it finds a replacement buyer, it must incur the substantial costs of contracting and installing the circuit for a different customer.[138] In return for giving up the benefit of its bargain on so many individual term-plan circuits, it is entirely appropriate to ask for enhanced assurances that limit the number of such circuits that can be migrated prematurely off of AT&T's network. Such assurances are needed both to enforce the separate portability agreement and to place an outer boundary on the costs that AT&T would potentially bear for prematurely canceled circuits under the newly rebalanced agreement.

In fact, the CLECs do not really dispute the need for some form of shortfall penalty.[139] Instead, they complain that the shortfall charges are excessive. In this connection, the *Designation Order* quotes old letters from Level 3 and XO claiming that shortfall penalties are "so large" that they in effect force CLECs into uneconomic decisions like "channel terminations to nowhere" – *i.e.*, keeping circuits in service merely to avoid the shortfall penalties.[140] But, as noted above, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** does not even subscribe to AT&T's portability plan and most CLECs that do, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** have substantial headroom. No CLEC with headroom could possibly be

[138] Reid Decl. ¶ 13.

[139] *See Designation Order* ¶ 76.

[140] *Designation Order* ¶ 73 (quoting Level 3 Feb. 22, 2012 *Ex Parte* Letter at 11); *see also id.* (quoting XO).

forced to maintain unneeded facilities. Moreover, as explained by Mr. Reid, AT&T's tariffs give customers many ways of managing their commitment levels to ensure that they do not incur shortfall penalties; for example, customers under the DCP can migrate circuits to the pure term plan which contains no volume commitments and receive corresponding reductions in their DCP commitment level.[141] And they can recalibrate their commitments when their term expires.

Of course, the whole point of a term plan is to secure a lower rate in exchange for a term commitment. Thus, even if a CLEC had to maintain facilities it no longer needed because of commitments it had made with regard to those facilities, that, in itself, is hardly a basis for concluding that the shortfall penalties were unreasonable.[142]

Finally, CLEC claims that AT&T's shortfall pricing is unreasonable are based on a theory of how shortfall penalties should be established that makes no sense. The CLECs claim that shortfall penalties are unlawful if they are set above the customer-specific sunk costs associated with the deployment of the facilities involved. But that argument makes no sense even for ordinary term plans, and it makes even less sense for portability plans. For one thing, the argument wrongly assumes that the only benefit of a term plan to a provider is assurance of recovering its sunk costs. That is not the case; in fact, term commitments are common throughout the economy in contexts where there are no customer-specific sunk costs (magazine subscriptions, fitness centers, etc.). Thus limiting shortfall penalties to the recovery of sunk costs would fail to compensate providers for broken commitments. As the D.C. Circuit has

[141] Reid Decl., Exhibit A at 3-4. *See also* AT&T's Narrative Responses to Tables I-XI at 1-2 (attached as Attachment 4.C to AT&T's Direct Case).

[142] Indeed, to the extent that premature cancelations result in "circuits to nowhere," it is more efficient to place the risks and costs of such circuits on the CLEC, which has the relationship with the retail customer and is thus better able to manage that risk in its contract with the retail customer.

recognized, an ILEC is entitled to establish terms that promote the stability and predictability of utilization of its network.[143]

Beyond that, it would be completely impracticable to establish customer-specific sunk costs associated with particular facilities. The Commission has abandoned cost-based regulation for good reason, and there is certainly no record in this proceeding upon which the Commission could resurrect and apply such an analysis. That would be true of term plans generally, but such measures would be especially unworkable in the context of the portability plans at issue, which involve a different bargain. Under AT&T's portability plans, AT&T agrees to confer a benefit not ordinarily available under term plan arrangements – the ability to terminate circuits without incurring an ETL charge. As explained above, there are additional costs to AT&T associated with this option – costs associated with the migration of facilities from one location to the other and from the migration of facilities off of AT&T's network. Limiting recovery in the event of a shortfall to the sunk costs associated with any particular facility fails to reflect those additional costs.

In addition, as noted above, the CLECs' shortfall liability provisions are similar to AT&T's.[144] For example, AT&T's agreement with one major CLEC provider requires AT&T to pay (for each year of the 5-year agreement) a "Total Revenue Commitment" on a take-or-pay basis, which means that AT&T must pay the CLEC the Total Revenue Commitment even if AT&T's purchases under the contract are less than the Total Revenue Commitment.[145] This CLEC plan, however, does not have any of the safety valves that AT&T's plans contain that give customers avenues for avoiding the shortfall penalties, such as the option to migrate circuits to

[143] *BellSouth*, 469 F.3d at 1056.

[144] *See* Casto Decl. ¶ 20.

[145] *Id.*

other AT&T plans with a corresponding reduction to the Commitment Levels or the ability to "buy down" Commitment Levels.[146] AT&T's portability options thus provide customers more flexibility in many respects than the types of "portability" contracts offered by CLECs.

D. AT&T's Upper Percentage Thresholds Are Lawful Under Section 201(b) and Section 202(a), and The Associated Overage Penalties Are Lawful Under Section 201(b) (¶¶ 79-84).

The Commission also designates upper percentage thresholds and associated overage penalties for investigation.[147] AT&T has such provisions only in its Southwestern Bell, Pacific Bell, and Ameritech tariffs.[148] As the Commission notes, under these provisions, if a customer's purchases increase by a certain percentage threshold above its initial commitment level, the customer is required either to increase its commitment level or pay an overage penalty. The CLECs argue that the upper percentage thresholds are unreasonable practices because they create incentives for customers to increase their volume commitments as their requirements increase, which in turn further reduces the size of the market available to competitors in subsequent periods.[149] The CLECs also claim that the upper percentage thresholds are discriminatory because (like the lower-bound percentage commitments) the discounts do not vary with the number of circuits purchased.[150] The overage penalties are also said to be an unreasonable practice, because they act as the "enforcement mechanism" for the unreasonable upper percentage threshold and serve to "lock up demand."[151]

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[146] *Id.*; Reid Decl., Exhibit A.

[147] *Designation Order* ¶¶ 79-84.

[148] *See id.* ¶ 79 n.225.

[149] *Id.* ¶ 79 (quoting BT Americas et al. Besen and Mitchell Decl. at 17-18).

[150] *Id.* ¶ 79.

[151] *Id.* ¶ 82.

These various arguments fail for the same basic reasons that the arguments against the percentage commitments fail. The upper percentage threshold relates only to the optional portability plans, not to rate discounts. As explained above, the portability plans commit AT&T to forgo ETLs on a large number of circuits and incur other uncompensated costs, and so AT&T potentially forgoes an even larger number of ETLs as a customer purchases circuits above 100 percent of its initial commitment level. Given that each additional circuit is granted a term-discounted rate, it is reasonable to set an upper limit on AT&T's potential costs from premature disconnections. AT&T's thresholds, such as the 124 percent level in the TPP plans, provide a reasonable range over which customers can cancel circuits without penalty. And as explained by Mr. Reid, customers have a variety of ways of avoiding the overage penalties.[152]

Nor is there any basis to the claim that upper percentage thresholds have any anti-competitive impact. To the extent that the CLECs are arguing that such provisions tend to "lock up" the market and make it difficult for existing CLECs to compete for business, the argument is internally inconsistent. If a customer is bumping up against the upper threshold, then that customer obviously has *massive* headroom available to move circuits to other providers (and thus avoid the overage penalty), to the extent such competitors are in a position to win that business. To the extent that the CLECs are arguing that such provisions decrease the "addressable market" and thus deter entry, the claim fails because, as discussed above, these tariffs account for only a relatively small percentage of the marketplace. Indeed, given the rapid decline in TDM services, "upper percentage" thresholds are becoming more theoretical rather than real. But in all events, even if AT&T found itself with a customer triggering the upper percentage threshold, such an

[152] Reid Decl., Exhibit A. Indeed, a customer will still have considerable headroom to move circuits to another provider even if the customer chooses to increase its commitment to avoid an overage penalty.

event would be far from a "lock-up." Even 124 percent of a very small number is still a very small number.

E. AT&T's Term Commitments Are Lawful Under Section 201(b) (¶¶ 85-90)

The Commission also designates for investigation the term commitments contained in the four AT&T tariffs at issue. The *Designation Order* again provides a litany of quotes from various CLEC letters, which argue that CLECs have "no choice" but to take service under ILEC tariffs with "longer terms than they ordinarily would" to receive lower wholesale rates.[153] The CLECs claim that these longer terms "multiply the effect" of the percentage commitments, which "reduce the demand that would otherwise be subject to competition."[154] These claims also lack merit.[155]

As an initial matter, the Commission does not appear to be concerned about the lawfulness of AT&T's term-discount plans *per se*, because the Commission has not designated AT&T's tariffs that offer pure term-discount plans for investigation. For example, the BellSouth tariff under investigation (the ACP plan) offers term discounts in conjunction with portability, but BellSouth offers the exact *same* term discount plans on a stand-alone basis in a separate tariff – the Channel Services Payment Plan ("CSPP")[156] – that has not been designated for investigation. Similarly, the Ameritech plan under investigation (the DCP plan) offers term

[153] *Designation Order* ¶ 85.

[154] *Id.*

[155] There is considerable irony in the fact that the Commission has designated this issue for investigation. AT&T plans to retire the copper TDM network used to provide the DS1s at issue early in the next decade. Anticipating those retirements, AT&T filed tariff revisions in late 2013 seeking to discontinue the five-year and longer term plans in the special access tariffs at issue that are now claimed to be unreasonable. As the Commission notes, AT&T's transmittal provoked a firestorm of protest in the form of numerous petitions to deny, the Commission suspended the transmittal and set it for investigation, and AT&T subsequently withdrew the filing. *Id.* ¶ 85 n.248.

[156] BellSouth Telecommunications LLC, Tariff F.C.C. No. 1, § 2.4.8(A).

discounts, but Ameritech offers the same term discount plans, with slightly larger discounts, under a separate plan (the Optional Payment Plan ("OPP"))[157] that has not been designated for investigation. If the Commission were concerned about the lawfulness of AT&T's term-discount plans, it would have designated the CSPP and OPP tariffs for investigation.[158] Further, the CLECs have not complained about any of AT&T's term plans in isolation. Consequently, the baseline of AT&T's term-discount plans should be taken as lawful.

In all events, AT&T's term discount plans are clearly lawful, for several reasons. First, term discounts are legitimate pro-competitive responses to competition that benefit both providers and customers.[159] Such discounts are common in competitive markets of all types.[160] Indeed, the Commission itself has repeatedly held that term discounts are a "legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic

[157] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.10.

[158] AT&T's pure term discount plans in the Southwestern Bell and Pacific Bell regions, which are identical to the ones in the TPP portability plan, happen to be in the same TPP tariff, but the *Designation Order*'s only quotations of CLEC criticisms of the TPP term plans are tied to the portability plan, *see Designation Order* ¶ 86, and there is no indication in the order that the Commission would have designated the stand-alone term plan in those regions for investigation if they had been filed in separate tariffs, as was the case in the Ameritech and BellSouth regions.

[159] *See, e.g.*, Carlton-Shampine-Sider Reply Decl. ¶¶ 75-83 (attached to AT&T Reply, WC Docket No. 05-25 (Feb. 24, 2010)) (special access term and volume "discounts are commonplace and can benefit consumers and enhance economic efficiency in a variety of ways" and "there are only limited circumstances in which such discounts may harm competition, and opponents do not show that such circumstances apply here").

[160] Carlton-Sider Decl. ¶ 90 (attached to AT&T Comments, WC Docket No. 05-25 (Jan. 19, 2010)) ("Volume, term and loyalty discounts are prevalent in many industries. In the telecommunications industry, for example, wireless subscribers typically receive handset discounts in exchange for committing to new contracts."). *See also, e.g.*, Comments of AT&T Inc., Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, at 77-78 (Jan, 19 2010) (describing many competitive industries where term and volume discounts are commonplace).

volumes and the certainty associated with longer-term relationships."[161] As discussed above, as long as AT&T's term discount plans are not predatory – and no party has argued that they are – there are no statutory grounds for finding such plans to be unlawful.[162]

The D.C. Circuit has also held that these types of discounts are "most naturally viewed as a bargain containing terms that both benefit and burden its subscribers."[163] Accordingly, the court admonished the Commission that complaints about such plans must be measured against the "critical fact" that ILECs have "no obligation to offer a discount plan at all" and thus that such plans, on their face, necessarily offer a benefit to consumers.[164] In that regard, contrary to the CLECs' claims, AT&T offers deep discounts beginning at the *three*-year term.[165] It should further be noted that the types of term discounts AT&T offers are common throughout the

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[161] *See, e.g.*, Fourth Memorandum Opinion And Order On Reconsideration, *Transport Rate Structure and Pricing*, 10 FCC Rcd. 12979, ¶ 13 (1995) (*citing Expanded Interconnection Order*, 7 FCC Rcd. 7369, ¶ 199 (1992)) ("both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships"); Third Report and Order, *Access Charge Reform*, 11 FCC Rcd. 21354, ¶ 187 (1997) (volume and term "discounts should be permitted . . . because they encourage efficiency and full competition"). The Commission claims that AT&T has ignored "contemporaneous statements qualifying" these holdings, *see Designation Order* ¶ 88 n.257, but the concerns the Commission expressed contemporaneously do not apply here. In particular, the Commission suggested in the *Access Charge Reform* NPRM that if an ILEC offered an end user a long term contract that "locked in" that customer before a competitor could enter and become efficient enough to offer a similar term discount, the incumbent could "forestall the day when the more efficient entrant" could offer the end user better prices. *Access Charge Reform*, 11 FCC Rcd. 21354, ¶ 190 (1996) (quoted in *Designation Order* ¶ 19 n.55). That concern does not apply in today's special access marketplace, where numerous competitors have built extensive networks and already offer competing term discount plans.

[162] *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) ("[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition") (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

[163] *BellSouth*, 469 F.3d at 1060.

[164] *Id.*

[165] Carlton-Israel-Shampine-Sider Decl. ¶ 52; Reid Decl., Exhibit A.

industry: CLECs, including the complaining CLECs, routinely offer term discounts on the circuits they offer.[166] As Drs. Carlton, Israel, Shampine and Sider explain, "[t]he fact that AT&T competitors, which presumably lack market power, use similar terms and conditions as those being challenged here indicates that such terms are not anticompetitive."[167]

F. AT&T's Early Termination Liabilities Are Not An Unreasonable Practice Under Section 201(b) (¶¶ 91-101)

The Commission is also investigating whether the use of an early termination liability provision in the term plans in the four AT&T tariffs at issue constitutes an unreasonable practice under Section 201(b) of the Act.[168]

The "use" of early termination liability provisions is clearly not an unreasonable practice. ETLs serve a number of important purposes. Indeed, they are essential to any term agreement, because if there were no ETLs, a customer could sign up for the longest term rate available and then cancel at any time without penalty. Sprint claims that some ETLs are actually higher than simply paying out the entire cost of the remaining contract, but that is not true of AT&T's ETLs, which in all cases are lower than what the customer would have paid if they had held the circuit to term.

The reasonableness of AT&T's ETLs is confirmed by the fact that they are comparable to, and in some cases lower than, the CLECs' ETLs.[169] For example, the early termination liability under AT&T's DS1 TPP pricing plan is equal to 40 percent of the month-to-month rate for the service multiplied by the number of months remaining in the term. By contrast, the

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[166] Casto Decl. ¶¶ 16-19.

[167] Carlton-Israel-Shampine-Side Decl. ¶ 55.

[168] *Designation Order* ¶ 91 & n.266.

[169] Carlton-Israel-Shampine-Side Decl. ¶ 55 ("[t]he fact that AT&T competitors, which presumably lack market power, use similar terms and conditions as those being challenged here indicates that such terms are not anticompetitive").

contract under which AT&T purchases service from one major provider imposes early termination liability equal to the full monthly recurring charge for the circuits for the first 12 months of the service term plus 50 percent of the monthly recurring charge for months 13 through the end of the term.[170] Similarly, under an agreement with another major provider, if AT&T cancels a circuit prior to the expiration of the term, AT&T is required to pay back the amount of discounts that it would otherwise have received for its purchases of circuits for the period between the termination date and the expiration date of the contract, plus AT&T must reimburse the provider for any termination charges that the provider incurs as a result of AT&T's early termination.[171]

There are also areas in which the ETLs of other providers are substantially higher than AT&T's ETLs. For example, in one case if AT&T terminates the term-discount service "for convenience" prior to the expiration of the term, AT&T must pay a termination charge equal to the sum of: (1) all unpaid amounts for the service provided through the date of termination: (2) any third-party termination charges paid by the provider; and (3) a specified percentage of the remaining monthly recurring charges through the end of the service term. The percentage varies according to the month in which the service is terminated. These amounts can far exceed those under the AT&T tariff pricing plans under investigation in this proceeding.[172]

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[170] Casto Decl. ¶ 17. Moreover, if this service is provided to AT&T using an off-net facility, AT&T is required to pay any early termination liability incurred by the provider in connection with that facility. *Id.*

[171] *Id.* ¶ 18 ("depending on the circumstances, the early termination liability under this [provider's] agreement can be substantially higher than under the AT&T tariff pricing plans that are under investigation in this proceeding").

[172] *Id.* ¶ 19.

G. Broadband Services Agreements Need Not Be Filed As Tariffs Under Section 203 (¶¶ 102-05).

Finally, the Commission notes that certain CLECs have argued that agreements for broadband services that contain "discounts, credits, waivers, refunds, or other provisions" relating to DSn service must be filed as tariffs under Section 203 of the Act.[173] The Commission makes clear that it does "not conclude at this point" that such agreements trigger the tariffing requirement, but it agrees to examine such agreements "to assess their effect on tariffed special access services."[174]

Section 203 does not require such commercial agreements to be tariffed. AT&T's tariffs relating to DSn services are applied and enforced as written; customers pay whatever rates or penalties are set forth in the tariff. AT&T, like most other carriers in the industry, separately enters into negotiated agreements for the provision of broadband services like Ethernet that have been the subject of Commission forbearance and which have been detariffed. Those agreements may take note of payments made under the DSn tariffs and provide credits against the price the customer pays for its broadband services, but that is an agreement relating to the price of the relevant broadband service.

Accordingly, there is no lawful basis to require such agreements to be filed as contract tariffs, and none of the CLEC letters cited by the Commission offer any argument to the contrary other than simply quoting the language of Section 203. But the Commission could not require such agreements to be tariffed now without revisiting its prior grant of forbearance. To date, the Commission has not provided any notice that it would reconsider any prior forbearance holdings nor would it be appropriate to do so in the context of this tariff investigation.

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[173] *Designation Order* ¶¶ 102-03.

[174] *Id.* ¶ 104.

Indeed, even if the Commission has the authority to revisit its forbearance ruling, such a reconsideration could occur only in a separate rulemaking. As AT&T has previously explained, Section 10 of the Act does not expressly provide for a "reversal" of forbearance.[175] The plain terms of Section 10 provide only for an affirmative petition asking the Commission to exercise its forbearance authority, and it spells out the substantive standards and procedural requirements that govern such petitions. Section 10 makes no mention of any other type of petition, such as a petition to reverse forbearance.[176] Moreover, in granting forbearance for Ethernet services, the Commission found that such services are not one-size-fits all and customers "demand[] . . . innovative service arrangements tailored to each customer's individualized needs."[177] The Commission also recognized that tariffing can deter competition: "tariffing allows AT&T's competitors to counter innovative product and service offerings even before they are made available to the public."[178] Thus, the Commission found forbearance would provide substantial

[175] *See, e.g.*, Comments of AT&T, Inc., *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, at 6, 27-32 (April 16, 2013) ("AT&T 2013 Comments"). Notably, the Commission never has reversed a forbearance determination. Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, at 9 (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf ("Schlick Statement") ("The difficulty of overcoming section 10's deregulatory mandate and a prior agency finding in favor of forbearance is illustrated by the fact that the FCC has never reversed a forbearance determination made under section 10, nor one made for wireless under the similar criteria of section 332(c)(1)").

[176] *Compare* 47 U.S.C. § 271(d)(6) (expressly providing for suspension or revocation of BOC interLATA authority upon a showing that the original conditions for such authority are no longer met).

[177] Memorandum Opinion & Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd. 18705, ¶ 21 (2007).

[178] *Id.* ¶ 33.

benefits for *customers*.[179] No party has offered any reason why the Commission should undermine these competitive and customer benefits by re-imposing tariffing requirements on broadband Ethernet services.

CONCLUSION

The Commission should conclude that the AT&T tariffs at issue are consistent with the Communications Act and close the investigation.

Respectfully submitted,

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January 8, 2016

[179] *Id.* ("detariffing of these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs").

ATTACHMENT 1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

DECLARATION OF PAUL REID

January 8, 2016

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WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

DECLARATION OF PAUL REID

I. QUALIFICATIONS AND BACKGROUND

1. My name is Paul Reid. I am Executive Director, Pricing at AT&T, a position I have held since October 2013. My responsibilities include pricing for products and services for AT&T's Wholesale and Federal segments, including for interexchange carriers, wireless customers, content providers, Competitive Local Exchange Carriers ("CLECs") and Internet Service Providers ("ISPs"). My prior position at AT&T was Director, Financial Analysis. In that position I was responsible for Financial Planning and support for AT&T's mobility network. I have worked in various roles in the telecommunications industry since January 1997. I have a Bachelors degree from Stephen F. Austin State University and a Master's degree from Southern Methodist University.

II. PURPOSE AND SUMMARY

2. The purpose of this declaration is to describe the nature and purpose of the AT&T tariffed pricing plans that are under investigation in this proceeding, the way AT&T's customers use these pricing plans, and the larger competitive context in which they are offered.

3. First, the AT&T tariffed pricing plans under investigation, which relate to TDM-based DS1 services, dramatically expand customers' ability to migrate services purchased from AT&T to competitive offerings. Customers can purchase AT&T's TDM-based DS1 services under month-to-month plans or they can purchase them under term plans, pursuant to which the customer receives substantial discounts for agreeing to maintain the service for a fixed period of time, typically for 1 to 5 years. Customers who disconnect a service prior to the agreed upon term under which they are receiving discounts are subject to early termination liability ("ETL"), as is common industry practice. The tariffed pricing plans under investigation offer customers an additional option called "portability." The portability feature allows customers to disconnect as many individual DS1 services they purchase from AT&T as they like prior to the expiration of the term under which they are receiving substantial discounts *without incurring ETLs*, as long as the customer maintains an overall number of DS1 services with AT&T. Moreover, these portability plans allow customers to simply disconnect (with no replacement) a significant portion – up to 20 percent – of the circuits subject to term plans under which they receive substantial term-based discounts without incurring any ETLs. The portability options thus enhance customers' ability to manage the end user network connectivity needs, including migrating services to competitive offerings by allowing them to do so for a large portion of the services they purchase from AT&T under term plans without incurring ETLs.

4. Second, the available data confirm that the four AT&T tariffed pricing plans being investigated in this proceeding do not "lock in" demand for DS1 circuits. To the contrary,

the data show that customers are migrating large portions of their historical TDM-based DS1 purchases from AT&T to alternatives and TDM-based DS1 services represent a rapidly declining portion of the special access marketplace. For example, AT&T's non-affiliate billed revenues for TDM-based DS1 services declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** in the last two years, which clearly indicates that customers are not locked-in to AT&T's tariffed pricing plans, nor precluded from taking advantage of competitive alternatives. Moreover, overall, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's remaining, and rapidly declining, base of TDM-based DS1 services are not sold under the portability plans at issue in this investigation; they are sold under different pricing plans offered by AT&T. Further, many of the CLECs who are cited most prominently in the *Designation Order* do not even use the portability plans at all. And, the CLECs that do choose to use the portability options offered by AT&T have substantial "headroom" above the volume-based commitments associated with the portability plans, which means that the AT&T customers that have chosen to use portability can move a significant portion of their DS1 circuits to competitive alternatives without incurring early termination or shortfall liability. CLECs also use pricing flexibility agreements and Broadband Services Agreements to gain additional flexibility. CLECs also continue to purchase hundreds of thousands of DS1 capable services each year as unbundled network elements ("UNEs"), bypassing AT&T's special access tariffs.

5. Finally, AT&T offers these DS1 pricing plans in the context of an intensely competitive marketplace, and those marketplace realities further refute assertions that AT&T's portability plans "lock in" customers. In my experience, AT&T typically faces competition from one or more competitive providers when seeking to win (and maintain) special access customers.

Further, this competition has intensified in recent years as the industry continues to undergo a fundamental transition *away* from TDM-based special access services to Ethernet services, and that fact is reflected in AT&T's rapidly declining DS1 revenues. In addition, special access customers can choose from among numerous competing providers, including CLECs, cable companies, utilities, fixed wireless providers, and incumbent local exchange companies ("ILECs"). Both CLECs and cable companies have won large shares of the marketplace, especially with respect to Ethernet services. In fact, Level 3 is the second largest Ethernet provider in the U.S. measured by port share, and Comcast has been identified as the fastest growing Ethernet provider for the last two years.

III. AT&T's TARIFFS OFFER CUSTOMERS SUBSTANTIAL FLEXIBILITY TO MIGRATE SERVICES TO COMPETITORS OR TO OTHER SERVICES

6. The only high-capacity services offered under the four AT&T tariffed pricing plans at issue in this investigation are legacy TDM-based DS1 services. I understand that certain CLECs have asserted that those four AT&T tariffed pricing plans "lock" customers into AT&T's TDM-based DS1 services. To the contrary, when these plans were introduced decades ago, their purpose was (and remains) to respond to customers' desire for *greater* control in managing their end-user connectivity needs including the flexibility to move and migrate DS1 circuits.

7. AT&T offers customers a number of options in purchasing TDM-based DS1 services, and to understand the increased flexibility the specific tariffs at issue provide, it helps to start by explaining how those tariffs fit into AT&T's other TDM-based DS1 offerings. Before AT&T filed the tariffed pricing plans at issue, customers could purchase TDM-based DS1 services under either a month-to-month arrangement or a term-discount plan. Term discount offerings are common throughout the telecommunications industry. The customer agrees to purchase the service for an established period of time (for example, 1, 3, or 5 years), and in

return the customer receives a discount off of the month-to-month rate. The term-based pricing plans include an ETL if the customer chooses to disconnect a service prior to the agreed-upon term.

8. In the early 1990s, some of AT&T's wholesale customers that purchased large numbers of circuits under term-discount plans asked for a tariffed option that would provide them greater flexibility to manage their base of circuits. These wholesale customers wanted the flexibility to move or disconnect a portion of the circuits they were using to serve their end user customers without having to incur early termination liability for those circuits. Each of the four legacy AT&T entities (Ameritech, PacBell, Southwestern Bell, and BellSouth) responded to these customer requests by developing and introducing optional "portability" pricing plans.

9. The four tariffed portability pricing plans at issue were filed in 1993 (for BellSouth and Ameritech) and in 2003 (for Southwestern Bell and Pacific Bell).[1] In each case, the portability option allows customers that are purchasing under term plans to disconnect as many circuits as they want prior to the end of the term without incurring early termination liability, as long as the customer maintains a minimum volume of purchases with AT&T for a specified period of time. The portability plans do not contain discounts in addition to the term discounts. Rather, the portability plans represent a means of avoiding ETLs. The portability feature allows the customer to manage "churn" by moving as many circuits as it likes – *i.e.*, to disconnect and add new DS1 services – regardless of term-based commitments under which it

[1] *See, e.g.*, Transmittal No. 684, Ameritech Operating Companies, Tariff F.C.C. No. 2, Description and Justification (Dec. 21, 1992) ("Customers have requested a time commitment plan which is not circuit specific but is instead based on a service commitment level. This program will allow customers to move Local Distribution Channels within a state and maintain discounted rates."); *see also* Transmittal No. 140, BellSouth Telecommunications, LLC, Tariff F.C.C. No. 1 (Aug. 31, 1993); Transmittal No. 2948, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 (May 2, 2003); Transmittal No. 113, Pacific Bell Telephone Company, Tariff F.C.C. No. 1 (May 2, 2003).

was receiving substantial discounts, without incurring early termination liability. In return for this greater flexibility, the customers provide greater assurances that they will continue to purchase a certain amount of service from AT&T.

10. These portability plans shift substantial risk to AT&T. As noted, the portability plans being investigated here allow customers to disconnect DS1 services prior to the end of the term on which their discounts are based without incurring ETLs. When this occurs, AT&T has effectively given the customer a substantial discount for the DS1 service without receiving its end of the bargain, *i.e.*, monthly payments for the DS1 service for the entirety of the agreed-upon term. For example, a customer that purchases a DS1 service under a five year plan will receive the larger term-based discount associated with the five year plan, even if the customer disconnects the circuit after only two years. In addition, AT&T incurs the costs of disconnecting the DS1 service, and the costs of installing replacement services. AT&T also forgoes the revenue certainty associated with term plans enforced by ETLs. And AT&T forgoes a certain amount of certainty with respect to the traffic that its network must be engineered to carry.

11. The DS1 TPP pricing plans offered in AT&T's Southwestern Bell and Pacific Bell regions illustrate how these portability plans work. These pricing plans permit customers to move as many DS1 services as they like and to disconnect without replacement up to 20 percent of the commitment level without incurring any early termination liability. In return the customer agrees to pay higher termination liability – referred to as shortfall liability – for disconnected lines in excess of 20 percent. In addition, even if the customer disconnects enough services during the term of the portability plan to trigger a shortfall payment, the customer continues to receive the term-discounted rates on all of its remaining circuits, just as it would have if it had not chosen the portability option.

12. The specific terms and conditions of the portability plans under investigation vary somewhat, because they were put in place many years ago when most of these affiliates were independent companies. In Exhibit A, attached hereto, I provide a detailed description of each of these pricing plans, as well as the other tariff pricing plans available to customers in each region.[2] A brief summary of each of these pricing plans and their distinguishing factors is set forth below.

13. AT&T's DS1 Term Payment Plan ("DS1 TPP") was implemented in 2003 in AT&T's Southwestern Bell and Pacific Bell regions replacing a prior portability offering in Southwestern Bell (HCTPP). The DS1 TPP is a term-discount plan, with a portability option. The portability option does not provide any additional rate discounts. Rather, in exchange for portability the customer agrees to a "commitment level," which is equal to the number of DS1 channel terminations purchased by the customer in the month prior to entering into the portability agreement. The customer further agrees to maintain 80 percent of that commitment level for the three-year term of the portability plan, or be subject to shortfall liability for each DS1 channel termination that is disconnected below that level. In return, the customer can disconnect and replace as many DS1 services as it likes, regardless of the term commitments on which its rate discounts are based, and it can disconnect, without replacement, up to 20 percent of its commitment level, all without incurring any of the early termination charges otherwise associated with the term commitments.

14. AT&T's Discount Commitment ("DCP") plan was implemented in 1993 in AT&T's Ameritech region. The DCP offers customers an alternative to the month-to-month

[2] Detailed descriptions of these plans are also provided on pages 1-5 of the document entitled "AT&T'S NARRATIVE RESPONSES TO TABLES I-XI," which AT&T is providing as Attachment 4.C to AT&T's Direct Case.

pricing plan and the Optional Pricing Plan ("OPP") term discount plan. Under the DCP, a "commitment level" is set equal to 90 percent of the DS1 channel terminations the customer was purchasing from AT&T at the time the DCP agreement was executed, excluding purchases under the OPP. The commitment is made on a state-by-state basis. The DCP does not offer additional rate discounts compared to the OPP. Rather, it offers portability. Specifically, the customer can disconnect DS1 channel terminations for which it is receiving term-based discounts prior to the end of term without incurring early termination liability, as long as the customer maintains a total volume of TDM-based DS1 channel terminations with AT&T equal to 90 percent of the number of channel terminations placed in the plan when it was initiated. Although the 90 percent commitment level is higher than the 80 percent level used in the DS1 TPP, it is important to recognize that the DCP permits the customers to move channel terminations between the DCP and the OPP, which means that customers can reduce their volume commitments under the DCP (the portability plan) by moving channel terminations to the OPP (a pure term plan) without incurring any early termination liability. For example, a customer that has a commitment level of 100 channel termination under the DCP can reduce that commitment level to 80 channel terminations by moving 20 channel terminations from the DCP to the OPP. In addition, the DCP allows customers a 90-day grace period to return to compliance before any shortfall liability is assessed. This 90-day grace period means that a customer can fall well below the commitment level under the DCP for a given month and incur no shortfall penalties as long as the customers returns to compliance within 90 days.

15. AT&T's Area Commitment Plan ("ACP") was implemented in 1993 in AT&T's BellSouth region. The ACP offered customers a new option in addition to the existing month-to-month pricing plan and the Channel Services Payment Plan ("CSPP"), which is a pure term

discount plan. The ACP offers the same term-based discounts and structure as the CSPP, but allows customers to obtain portability. In contrast to the DS1 TPP and DCP portability plans, the ACP does not require the customer to make volume commitments based on the amount of services the customer is already purchasing from AT&T. Instead, the ACP allows the customer to choose how many and which TDM-based DS1 services to place in the ACP. The customer thus has full control over how many of its TDM-based DS1 services are purchased under month-to-month plans, the pure term plan (CSPP), and the portability plan (ACP). Because the customer has full control as to how many TDM-based DS1 services to place under the ACP, the customer is required to maintain that level for the selected portability plan. Thus, the ACP portability plan enables customers to move and replace the DS1 services they identify without sacrificing term discounts for those services or incurring any ETLs.

IV. MARKETPLACE FACTS CONFIRM THAT AT&T'S PORTABILITY PLANS DO NOT "LOCK IN" CUSTOMERS.

16. The available data confirm that the CLECs' claims that AT&T is using the tariffed pricing plans under investigation to lock in customers are inaccurate.

A. AT&T Offers Multiple Options To Customer Who Choose To Purchase TDM-based DS1 Services From AT&T.

17. In my experience, the AT&T tariff pricing plans under investigation in this proceeding do not prevent, and have not prevented, customers from migrating a substantial portion of their TDM-based DS1 services to competitive offerings or to different services. AT&T's data show that CLECs have the flexibility to move very substantial portions of the DS1 circuits they purchase from AT&T without being subject to any volume commitment.

18. *First*, the contention that AT&T has "locked in" all of the available DS1 circuits is not consistent with the fact that AT&T's non-affiliate-billed revenues for TDM-based DS1 services declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END**

HIGHLY CONFIDENTIAL] between January, 2013 and October, 2015 and by about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** between January 2014 and October 2015. Customers seeking to negotiate pricing flexibility or other arrangements with AT&T routinely, and credibly, threaten to migrate their services from AT&T to competitive alternatives. In these circumstances, it is difficult to see how AT&T can be "locking" its customers in when it has experienced such a rapid decline in its TDM-based DS1 revenues over such a short period of time.

19. In fact, many of the CLECs that claim to be locked in to the tariff pricing plans have actually migrated a significant portion of their TDM-based DS1 volumes from AT&T to competitive alternatives. For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** reduced the volume of TDM-based DS1 purchases from AT&T by about 18% between September 2013 and November 2015. Similarly, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** reduced its volume of TDM-based DS1 purchases from AT&T by about 16% during that period, and **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** reduced its volume of TDM-based DS1 purchases from AT&T by about 19% during that period.

20. *Second*, I understand that certain CLECs have asserted that they have "no choice" but to purchase all or most of their TDM DS1 services under the AT&T portability pricing plans under investigation. That contention, however, is also inconsistent with the facts. Many of AT&T's wholesale customers – including some of the CLECs most prominently cited in the *Designation Order* – choose *not* to use AT&T portability plans. For example, in 2014, neither **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END**

HIGHLY CONFIDENTIAL] purchased services from AT&T under any of these portability pricing plans. In addition, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** does not use AT&T's portability plan in the Ameritech region, and its subscriptions to the portability plans in the Southwestern Bell and Pacific Bell regions expire this year.

21. Further, a substantial portion of AT&T's TDM-based DS1 services are sold under pricing plans that are not subject to this investigation.[3] In 2014, for example, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the TDM-based DS1 circuits sold by AT&T in the Ameritech region were not purchased under the DCP, but were instead purchased under month-to-month arrangements or under the OPP, neither of which are subject to this investigation. In the BellSouth and Pacific Bell regions, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of all DS1 circuits for 2014 were sold under tariffed pricing plans that do not include volume commitments. And in the Southwestern Bell Region, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of DS1 circuits sold by AT&T in 2014 were under plans that do not include volume commitments.[4] Overall, less than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the circuits sold by AT&T in these four regions were under plans that include volume commitments.[5]

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[3] This reflects the fact that very few of AT&T's retail customers – which account for about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of AT&T's DS1 sales – use the portability option.

[4] These metrics were computed using data from AT&T's ordinary course billing systems. The calculation for BellSouth uses channel terminations as a proxy for circuits because AT&T systems lack information that allow these metrics to be computed at the circuit level.

[5] Further, only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of non-affiliate DS1 sales were under the portability plans under investigation.

22. *Third*, an analysis of the "headroom" available to AT&T's customers who have chosen to purchase under an AT&T portability plan further illustrates the flexibility these customers have to migrate to competitive alternatives. Headroom refers to the difference between the number of in-service channel terminations and number of channel terminations that a customer must purchase to avoid a shortfall penalty. A portability plan customer with substantial headroom can disconnect a large number of DS1 services without incurring early termination *or* shortfall penalties. These services, therefore, can be readily migrated to competitors or to other services. As shown in Table 1, below, AT&T's customers had substantial headroom in the three AT&T portability plans that have a percentage commitment.[6]

Table 1. Average Overall Percent Channel Termination Headroom For AT&T Customers Purchasing Under The DS1 TPP and DCP.[7]

	2012	**2013**	**2014**
SWBT DS1 TPP With Portability	27%	23%	16%
PacBell DS1 TPP With Portability	22%	13%	10%
Ameritech DCP	16%	17%	11%

23. Table 1 also shows that customers had, on an overall average basis, substantial headroom during each of the years for which the Commission is examining data. For example, in 2014, customers purchasing services under the Southwestern Bell DS1 TPP with portability had, on average, 16 percent headroom, *i.e.*, the number of channel terminations actually purchased were, on average, 16 percent above the minimum commitment levels. All of this

[6] Customers who choose to purchase under the BellSouth ACP do not have headroom because the BellSouth ACP requires customers to maintain 100 percent of their volume commitment level to avoid shortfall penalties. However, as previously noted, customers who choose the BellSouth ACP are not required to commit a minimum portion of their existing DS1 purchases when they initiate the plan. Rather, customers who choose to purchase DS1 services under the BellSouth ACP choose the number of DS1 services to commit to the plan.

[7] The values are the weighted average of positive headroom over each month for each customer.

headroom was available to be migrated to competitive alternatives without triggering ETLs or shortfall liability.

24. The extensive headroom – and flexibility to move DS1 circuits free from volume commitments – is further confirmed when one examines the purchases of the specific CLECs cited in the *Designation Order*. As shown in Table 3, below, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** do not even purchase under the AT&T portability pricing plans under investigation, and the remaining CLECs that do purchase from AT&T had substantial headroom during the period being investigated in the *Designation Order* (2012-2014).

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[redacted]

[END HIGHLY CONFIDENTIAL]

25. These headroom tables actually understate the flexibility available to these customers. For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[8] The values are the weighted average of positive headroom for each customer over each month from 2012 through 2014.

[redacted]

[redacted] **[END HIGHLY CONFIDENTIAL]**

26. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[redacted]

[9] *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(G).

[redacted] **[END HIGHLY CONFIDENTIAL]**

27. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

28. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[redacted] **[END HIGHLY CONFIDENTIAL]**

29. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

30. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** The Sprint example, however, actually *further* demonstrates that the AT&T tariffed pricing plans under review do not "lock in" customers. Prior to 2012, a large portion of the TDM-based DS1 services being purchased by Sprint were used for wireless backhaul, and were being purchased under the AT&T tariffed pricing plans under investigation. These pricing plans, however, did not prevent Sprint from migrating its backhaul services to Ethernet. In fact, Sprint has since migrated virtually all of its TDM-based

DSn wireless backhaul circuits to Ethernet service.[10] Sprint issued RFPs and received responses from a wide range of competitive providers, including cable companies and CLECs.[11] Sprint ultimately awarded those contracts to a number of different competitors.[12] During this process, Sprint was able to reduce its commitments under the AT&T tariffed pricing plans being investigated in this proceeding by taking advantage of the buy-down provisions in those tariffs and accepting shortfall penalties in some cases. The lesson is that even if a carrier wants to cancel a large number of TDM-based services, the portability plans do not prevent such migrations.

31. *Fourth*, AT&T has worked cooperatively with customers who have sought alternative means to facilitate their migration of TDM-based DS1 services to Ethernet services. In each metropolitan statistical area ("MSA") where AT&T has been granted Phase II pricing

[10] Phil Goldstein, *Sprint's Robbiati vows to keep improving on the network and churn even amid cost cuts*, Fierce Wireless Tech, Nov. 11, 2015, http://www.fiercewireless.com/story/sprints-robbiati-vows-keep-improving-network-and-churn-even-amid-cost-cuts/2015-11-11 (quoting Sprint's CFO as saying that "the 'vast majority' of Sprint's backhaul is now fiber"); Sue Marek, *Sprint: Ethernet backhaul gives us 20 times more bandwidth*, Fierce Wireless Tech, Aug. 15, 2012, http://www.fiercewireless.com/tech/story/sprint-ethernet-backhaul-gives-us-20-times-morebandwidth/2012-08-15.

[11] Jeff Baumgartner, *Sprint to Place Big Backhaul Bet*, Light Reading, Sept. 29, 2011, http://www.lightreading.com/mobile/backhaul/sprint-to-place-big-backhaul-bet/d/d-id/690289.

[12] According to Sprint, it sought bids for the provision of these services and apparently correctly predicted that it would end up "with '25 to 30 significant backhaul providers' that will likely be a mix of incumbent LECs, cable MSOs, and alternative carriers." Carol Wilson, *Sprint to Reveal Backhaul Contract Winners Friday*, Light Reading, Oct. 5, 2011 (quoting Sprint's VP of Roaming and Access Planning, Paul Schieber), http://www.lightreading.com/ethernet-ip/sprint-to-reveal-backhaul-contract-winnersfriday/d/d-id/690452; US Telecom, *Sprint Contract Results Demonstrate Competition for High-Capacity Services*, Sept. 14, 2012, https://www.ustelecom.org/blog/sprint-contract-results-demonstrate-competition-high-capacity-services (noting that public reports indicate that "all of the major cable companies were awarded part of the contract to provide Ethernet services to Sprint"). Verizon has stated "Sprint had awarded Verizon the backhaul business at only [a very small percentage] of the total number of [Sprint's cell] sites in the Verizon incumbent footprint." Letter from Kathleen Grillo (representing Verizon) to Marlene H. Dortch (FCC), WC Docket No. 05-25, RM-10593 at 2 (September 12, 2012).

flexibility for channel terminations, customers can negotiate terms and conditions for the purchase of TDM-based DS1 services that meet their individual needs. These negotiated contracts contain discounts, commitment levels, early terminations charges, shortfall charges, and other terms that are specified by the customer and agreed to by AT&T. In many instances, customers negotiate contracts that allow them to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

32. In addition, some customers have negotiated with AT&T "Broadband Services Agreements" ("BSAs") that permit customers to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[13] *E.g.*, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 41.185.9; Pacific Bell Telephone Company, Tariff F.C.C. No. 1, Contract Offer No. 164; BellSouth Telecommunications, LLC, Tariff F.C.C. No. 1, Contract Offer No. 80; and Ameritech Operating Companies, Tariff F.C.C. No. 2, Contract Offer No. 215.

33. *Fifth*, customers can (and many do) purchase equivalent DS1 services completely outside of special access tariffs. Competitors continue to have access to ILEC-provided DS1 and DS3 Unbundled Network Element ("UNE") loops and transport at TELRIC rates. Many CLECs, including some that are prominently mentioned in the *Designation Order*, meet a substantial portion of their needs by purchasing DS1 UNEs. In 2014, AT&T customers purchased hundreds of thousands of DS1 UNE loops from AT&T. Some of the largest users of AT&T's UNE loops include **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

B. Customers Can Choose Among Multiple Suppliers Of Special Access Services.

34. Competitive realities also demonstrate that AT&T does not lock in TDM-based DS1 customers using its portability plans. There are numerous competing providers of special access services in the marketplace, including CLECs, cable companies, utilities, fixed wireless providers, and ILECs. During the course of the on-going Special Access proceeding (WC Docket No. 05-25), AT&T has on multiple occasions documented the intense competition for special access services. For example, as far back as 2005, my colleague, Parley Casto, submitted analyses showing the proximity of known CLEC fiber to AT&T's DS1 and DS3 demand in ten MSAs[14] and, in 2007, Mr. Casto supplemented this information for an additional five MSAs.[15]

[14] Declaration of Parley C. Casto on Behalf of SBC Communications Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, at ¶ 14 (June 13, 2005).

[15] Supplemental Declaration of Parley C. Casto on Behalf of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, at ¶ 10 (Aug. 8, 2007).

These data showed that the vast majority of AT&T's demand for both DS1 and DS3 services was either already connected to or within 1,000 feet (about three blocks) of known CLEC facilities. And this analysis substantially understated the true extent of the competition, because it focused only on locations served by AT&T and thus omitted other locations served by a competitive provider.[16]

35. Since Mr. Casto submitted his analysis, competition for special access services has increased dramatically. One of the most significant changes in the marketplace has been the industry-wide shift away from TDM-based special access services to Ethernet services. Ethernet services are a substitute for TDM-based services, and Ethernet services are typically more flexible and cost effective. As a result, demand for Ethernet services has dramatically increased during the past several years, as the industry has transitioned from TDM-based services to Ethernet services.

36. Publicly available reports confirm this transition. In 2013, the U.S. base of Ethernet port installations increased by 26 percent, followed by a 23 percent increase in 2014.[17] U.S. Ethernet port growth in the first half of 2015 has been described by industry analysts as "unprecedented, easily surpassing estimates"; and analysts have observed that there "are few indications of the typical slowing growth patterns expected for a market of this size and maturity."[18]

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[16] *Id*. ¶ 11.

[17] Vertical Systems Group, U.S. Ethernet Service Ports Jump 26% in 2013, Feb. 19, 2014, http://www.verticalsystems.com/vsgpr/u-s-ethernet-service-ports-jump-26-in-2013/; Vertical Systems Group, 2014 U.S. Carrier Ethernet LEADERBOARD, Feb. 19, 2015, http://www.verticalsystems.com/vsglb/2014-u-s-carrier-ethernet-leaderboard/ ("Continued solid market demand for higher bandwidth services boosted the U.S. base of Ethernet port installations 23% in 2014.").

[18] Vertical Systems Group, Mid-2015 U.S. Port Share (2015).

37. AT&T's experience reflects these trends. As noted, from January 2013 through October 2015, AT&T's sales of DS1 services (the only special access services covered by the tariffed pricing plans under investigation) declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] [**END HIGHLY CONFIDENTIAL]** In addition, the number of new DS1 purchases from AT&T (*i.e.*, gross, not net, additions) declined by nearly **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** since the end of 2013. By contrast, the number of new Ethernet purchases (*i.e.*, gross additions) during this period has more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

38. Some parts of the industry have already shifted almost entirely to Ethernet services. For example, AT&T Mobility has already transitioned the vast majority of its wireless backhaul circuits to Ethernet. Similarly, T-Mobile announced in 2012 that it had transitioned over 95 percent of its backhaul from TDM to Ethernet.[19] And Sprint has likewise reported that it has transitioned its backhaul circuits from TDM to Ethernet.[20] As AT&T has previously demonstrated, these entities have used a large number of non-ILECs for these Ethernet services.[21]

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[19] *See* Tammy Parker, *T-Mobile: 95% of our backhaul is fiber*, Fierce Wireless Tech., Aug. 1, 2012, http://www.fiercewireless.com/tech/story/t-mobile-95-our-backhaul-fiber/2012-08-01; David Beren, *T-Mobile Says "Backhaul Strategy Key To A Competitive 4G Experience"*, TmoNews, Aug. 1, 2012 (quoting T-Mobile's Senior Vice President of Technology Strategy, Finance & Development regarding the advantages of Ethernet over TDM for backhaul), http://www.tmonews.com/2012/08/t-mobile-says-backhaul-strategy-key-to-a-competitive-4g-experience/.

[20] Dan Jones, *Sprint Plots WiMax Shutdown, Backhaul Upgrade*, Light Reading, Apr. 8, 2014, http://www.lightreading.com/sprint-plots-wimax-shutdown-backhaul-upgrade/d/d-id/708596.

[21] *See, e.g.*, Letter from Frank S. Simone to Marlenet H. Dortch, WC Docket No. 05-25 (May 22, 2012).

39. The evidence also shows that there are many successful and rapidly growing providers of Ethernet services. When the transition to Ethernet began, all competitors, including the ILECS, were largely starting from scratch because no competitor had widely deployed Ethernet services to all or even a majority of buildings in any metropolitan area. Seizing this opportunity, many connectivity providers, including ILECs, CLECs, cable companies, and others, began investing billions of dollars to deploy Ethernet service to their customers.

40. The result is a highly competitive marketplace. A recent industry analysis confirms that there are dozens of non-ILEC providers of Ethernet services.[22] No provider has port share that exceeds one-fifth of the marketplace.[23] There are eight providers with port shares of four percent or more, including two CLECs, and three of the nation's largest cable companies.[24] Level 3, a CLEC, is the second largest Ethernet provider in the U.S. measured by port share,[25] and Comcast was recently named the fastest growing Ethernet provider for the second consecutive year and is said to be "well positioned in 2015 due to its extensive fiber network footprint."[26] And other providers – *i.e.*, those with port shares under four percent – together have, in aggregate, port share in excess of 20 percent.[27] In fact, an executive of a large cable company recently explained that he "no longer views [ILECs] as the top players in the

[22] Vertical Systems Group, ENS Research Program (2015).

[23] *Id*.

[24] Vertical Systems Group, Mid-Year 2015 U.S.Carrier Ethernet LEADERBOARD, Aug. 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[25] *Id*.

[26] Comcast, The Fastest Growing Ethernet Provider, Two Years Running, Feb. 25, 2015, http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running.

[27] Vertical Systems Group, ENS Research Program (2015).

enterprise space, but is seeing aggressive activity from competitive players such as Level 3 . . . and XO."[28]

41. All of this competitive activity is consistent with my experience. When AT&T competes for business customers, AT&T typically faces competition from a number of alternative suppliers, and these competitors often win the customer. My experience in this regard is confirmed by publicly available information on competitive activity in the marketplace. In Exhibit B, attached hereto, I provide an overview of publicly available information about the competitive activity by CLECs, cable companies, and fixed wireless providers which further demonstrates that the marketplace for special access services is highly competitive.

CONCLUSION

42. For the forgoing reasons, claims that the AT&T tariffed pricing plans being investigated "lock in" customers to AT&T's TDM-based DS1 services are inconsistent with the terms of AT&T's tariffs and with marketplace realities.

[28] Carol Wilson, *Cable Looking Past AT&T, Verizon*, Light Reading, Dec. 4, 2015, http://www.lightreading.com/cable/cable-business-services/cable-looking-past-atandt-verizon/d/d-id/719679.

VERIFICATION

I hereby swear under penalty of perjury that, based on the best information available to me, the foregoing is true and correct.

/s/ Paul Reid
Paul Reid

Dated: January 8, 2016

EXHIBIT A

SUMMARY OF TARIFF PRICING PLANS UNDER INVESTIGATION

Each of the AT&T tariff pricing plans under investigation provides a portability option for TDM-based DS1 services. This appendix describes these tariff pricing plans and the alternative tariff pricing plans available to customers who choose to purchase TDM-based DS1 services from AT&T.

DISCOUNT COMMITMENT PLAN (AMERITECH REGION)

The Discount Commitment Plan ("DCP") is one of the tariffed pricing plans offered in AT&T's Ameritech region (also referred to as the "Midwest").[1] Customers can also choose a month-to-month arrangement or a pure term-based plan. All of these options are described below.

Month-To-Month Plan. AT&T offers a month-to-month option for TDM-based DS1 services in the Midwest region.[2] Customers who choose the month-to-month option can terminate circuits at the end of any month without incurring early termination charges. AT&T's month-to-month pricing plan is not subject to this investigation.

Option Payment Plan. Another option for customers seeking to purchase TDM-based DS1 services in AT&T's Midwest region is the Optional Payment Plan ("OPP").[3] This plan is also not a part of this investigation. The OPP offers term discounts for term lengths of one, two, three, four, and five years.[4] The bulk of the discounts under the OPP are available under the three-year term (about a 60 percent discount from monthly rates). Customers who choose a five-

[1] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13.

[2] *Id.*, § 7.5.9(B)(1).

[3] *Id.*, § 7.4.10

[4] *Id.* § 7.4.10(A).

year term can get a slightly higher discount (about 64 percent). Customers who purchase TDM-based DS1 service under OPP are subject to early termination charges if they disconnect the circuit before the agreed-upon term ends.[5]

Discount Commitment Plan (DCP). The DCP is the only AT&T Midwest tariffed pricing plan that is part of this investigation.[6] The DCP has been in place since December 1992.[7] As explained in the "Description and Justification" submitted with the 1992 filing of this tariff: "Customers have requested a time commitment plan which is not circuit specific but is instead based upon a service commitment level. This program will allow customers to move Local Distribution Channels within a state and maintain discounted rates."[8]

Like the OPP, the DCP is a term discount plan.[9] There are no volume discounts. The DCP applies to Direct Analog,[10] Base Rate,[11] and DS1 services, including channel mileage, channel mileage termination, DS1 to voice/Base Rate Multiplexers, and local channel distribution channels (*i.e.*, channel terminations). Customers sign up for a separate DCP for each state within the Midwest region.[12] For each state, the customer chooses a term of either three years or five years. The discounts available under the DCP vary somewhat from state-to-state and zone-to-zone. A customer who chooses the three-year DCP term receives a discount of

[5] *Id*. § 7.4.10(C).

[6] *Id*. § 7.4.13.

[7] Transmittal No. 684, Ameritech Operating Companies, Tariff F.C.C. No. 2 (Dec. 21, 1992).

[8] *Id*. (Description and Justification).

[9] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13.

[10] Direct Analog services are voice grade services.

[11] Base Rate services are low bandwidth data services.

[12] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(A).

about 53 percent from the month-to-month rates; a customer who chooses the five-year DCP term receives a slightly higher discount of about 58 percent from the month-to-month rates.[13]

The DCP also includes a portability feature. When a customer signs up for a DCP term plan, the customer agrees to maintain a "Commitment Level" equal to 90 percent of the customer's in-service local distribution channels (*i.e.*, channel terminations for Direct Analog, Base Rate and DS1 services).[14] A separate Commitment Level is established for each state in the Midwest region.[15]

The portability feature of the DCP permits the customer to disconnect and move as many circuits as the customer would like as long as the total number of circuits under the plan remains above the commitment level and below 130 percent (for a three-year plan) or 150 percent (for a five-year plan) of the number of in-service local distribution channels used to compute the Commitment Level.[16]

If the number of in-service local distribution channels falls below the Commitment Level, the customer has multiple options. *First*, the customer may reduce its Commitment Level at no charge by migrating circuits from the DCP to the OPP; each circuit migrated to the OPP plan results in a corresponding reduction to the DCP Commitment Level. *Second*, the customer can "buy down" its Commitment Level by paying a fee; if the customer opted for a five-year term under the DCP, but wants to reduce its Commitment Level after year three, the customer has the option to pay to AT&T an amount equal to the difference between the five-year rate the customer received and the three-year rate for each local distribution channel by which the Commitment

[13] *Id.* § 7.5.9(B)(1). These discounts are based on Zone One rates in Illinois.

[14] *Id.* § 7.4.13(B).

[15] *Id.*

[16] *Id.*

Level is reduced; if the customer does not satisfy the three-year term, the customer pays the difference between the rate the customer was being billed and the month-to-month rate.[17] *Third*, the customer can pay a shortfall penalty for the months in which its in-service local distribution channels are less than the Commitment Level. The shortfall penalty is computed in a manner that effectively requires the customer to pay the agreed upon rate for all of the agreed upon the circuits. However, customers are given 90 days to correct any shortfall. Thus, if a customer comes back into compliance within 90 days of any month in which there was a shortfall, no shortfall liability is assessed.

As noted, when the customer initiates purchases under the DCP, it is allowed to place all of its in-service local distribution services under the DCP and receive the DCP discounts, and its commitment level will be equal to 90 percent of those local distribution services. The customer is also allowed to add more local distribution services to the DCP, up to 30 percent above the original in-service level for the three-year DCP and 50 percent above the original in-service level for the five-year DCP. Because these additional services receive the DCP discount, but can be disconnected at any time with no early termination liability, this feature effectively allows the customer to add a significant number of month-to-month services at the DCP discounted prices. The 30 percent and 50 percent caps limit the number of such circuits. Customers may still add services above those levels, but they will have to pay the actual month-to-month rate for those above the commitment level. Or, the customer can increase its commitment at no cost and receive the DCP discount for all of its qualifying services.[18]

[17] *Id*. § 7.4.13(E).

[18] *Id*. § 7.4.13(D).

AREA COMMITMENT PLAN (BELLSOUTH REGION)

The Area Commitment Plan ("ACP") is available in AT&T's BellSouth region (often referred to as the "Southeast").[19] The ACP covers TDM-based DS1 services, but not other high-speed dedicated access services (*e.g.*, DS3s, OCNs). Customers can also choose a month-to-month arrangement or a pure term-based plan. All of these options are described below.

Month-to-Month Plan. One option for customers seeking to purchase TDM-based DS1 services in the Southeast region is AT&T's month-to-month plan.[20] This pricing plan is not subject to this investigation. Customers who choose the month-to-month option can terminate circuits at the end of any month without incurring early termination charges.

Channel Services Payment Plan. Another option for customers seeking to purchase TDM-based DS1 services in the Southeast region is AT&T's Channel Services Payment Plan ("CSPP"), which offers term discounts.[21] This plan is not subject to this investigation. The CSPP has two term discounts: "Plan A" contains a term discount for customers who choose a term between 24-48 months and "Plan B" contains a term discount for customers who choose a term between 49-72 months.[22] There is a single discounted rate for Plan A and a higher single discounted rate for Plan B, but the customer can choose any term period within the permissible range for each plan.[23] Customers who choose the CSPP can choose a different term for each rate element associated with the service. For example, a TDM-based DS1 customer can choose the same or different terms for the channel termination, mileage and multiplexing components. A

[19] BellSouth Telecommunications LLC, Tariff F.C.C. No. 1, § 2.4.8(B).

[20] *Id*., § 2.4.2.

[21] *Id*., § 2.4.8(A).

[22] *Id*.

[23] *Id*.

customer who cancels a service prior the expiration of the chosen term is subject to early termination liability.[24]

Area Commitment Plan (ACP). The ACP is the only AT&T tariffed pricing plan in the Southeast region that is part of this investigation. The ACP has been in place since August 1993.[25] As explained in the "Description and Justification" submitted with the 1993 filing of that tariff with the Commission: "ACP allows customers who have obtained service on a month-to-month basis to commit to maintain a level of service for a specified period of time."[26]

The ACP offers the same term discounts as the CSPP, described above. In addition, the ACP also includes a portability feature that requires a volume commitment.[27] The size of the volume commitment is entirely up to the customer. The customer can place as many or as few services under the ACP as it wants. But once the choice is made, the Commitment Level is set at that amount, and the customer is required to maintain that number of services within the ACP for the chosen term. Any DS1 services purchased from AT&T that are not placed in the ACP can be purchased using the month-to-month or CSPP plans described above.

The ACP term discounts and portability components apply on a rate element-by-rate element basis.[28] Accordingly, the customer separately chooses the number of DS1 local channels, interoffice channel mileage, and multiplexing to place within the plan, and the term for each rate element. The customer may choose a different term for each rate element.

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[24] *Id*.

[25] Transmittal No. 140, BellSouth Telecommunications, LLC, Tariff F.C.C. No. 1 (Aug. 31, 1993).

[26] *Id*. (Description of Service).

[27] BellSouth Telecommunications LLC, Tariff F.C.C. No. 1, § 2.4.8(B).

[28] *Id*.

The customer also is permitted to disconnect as many circuits at it likes, as long as it maintains the commitment level.[29] This allows customers to, for example, move as many circuits as they want during the term of the plan.

If the number of in-service rate elements under the ACP is less than the chosen commitment level, a shortfall charge will apply. The shortfall charge is equal to the difference between the customer's commitment level and the number of in-service rate elements of the relevant type (local channel, channel mileage, multiplexing) multiplied by about 50 percent of the applicable ACP rate.[30]

There are multiple ways for customers to avoid the shortfall charge. *First*, a customer can cancel the ACP agreement and initiate a new one with a lower Commitment Level. This will result in a termination charge equal to the ACP rate associated with the existing ACP agreement multiplied by the difference in months between the time the ACP agreement has been in effect and the minimal months (24 for Plan A and 49 for Plan B) of the existing agreement times 20 percent for agreements that have been in effect for longer than twelve months or 40 percent for agreements that have been in effect for 12 months or less.[31]

[29] *Id.*

[30] *Id.*

[31] *Id.*

DS1 TERM PAYMENT PLAN (SOUTHWESTERN BELL AND PACIFIC BELL REGIONS)

The DS1 Term Payment Plan ("DS1 TPP") is available in AT&T's Southwest and West regions (*i.e.*, the legacy Southwestern Bell and legacy Pacific Bell Regions).[32] It is the alternative to the month-to-month arrangements in these regions.

The DS1 TPP is a term discount plan for DS1 services. The DS1 TPP has been in place since May, 2003.[33] The terms available under the DS1 TPP are one, two, three, five, and seven years.[34] The bulk of the discounts are available under the three-year term. These term plans are subject to early termination liability if the customer disconnects the service before the agreed-upon term ends. The early termination liability is equal to 40 percent of the month-to-month rate multiplied by the number of remaining months in the term.[35] AT&T's Guidebook waives early termination liability if the customer migrates a DS1 circuit purchased under the plan to an AT&T Ethernet service.

The DS1 TPP has a "portability" option called the DS1 High Capacity Service Portability Commitment. The DS1 High Capacity Portability Commitment does not include any additional discounts.[36] If a customer chooses to add the portability feature, a region-wide Commitment Level is set at the number of DS1 Channel terminations purchased by the customer from AT&T

[32] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18; Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22.

[33] Transmittal No. 2948, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 (May 2, 2003); Transmittal No. 113, Pacific Bell Telephone Company, Tariff F.C.C. No. 1 (May 2, 2003).

[34] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(A); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(A).

[35] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(G); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(G).

[36] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E).

in the previous month.[37] The customer is then permitted to move circuits or disconnect as many circuits as it wants, regardless of term commitments, and without incurring early termination liability, so long as the customer maintains a number of in-service DS1 channel terminations on term plans of 2 years or more within the range of between 80 percent and 124 percent of the Commitment Level.[38]

If a customer's TDM-based DS1 channel termination purchases from AT&T fall below 80 percent of the Commitment Level, the customer has multiple options. *First*, the customer can "buy down" (*i.e.*, reduce) its Commitment Level by paying to AT&T an amount equal to the number of decreased DS1 channel terminations multiplied by the month-to-month rate multiplied by the number of months remaining for the portability option. *Second*, the customer can pay a shortfall fee for the months during which the customer's DS1 channel terminations are below 80 percent of the Commitment Level. The shortfall fee is equal to the number DS1 channel terminations below the commitment multiplied by the non-recurring charge for DS1 channel terminations.[39]

As noted, when the customer initiates purchases under the DS1 TPP, it is allowed to place all of its in-service local distribution services under the DS1 TPP and receive the DS1 TPP term discounts. The customer is also allowed to add more circuits to the DS1 TPP, up to 24 percent above the Commitment Level. Because these additional circuits receive the DS1 TPP term discount, but can be disconnected at any time with no early termination liability, this feature

[37] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E).

[38] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E).

[39] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4).

effectively allows the customer to add a significant number of month-to-month circuits at the discounted prices. The 24 percent cap limits the number of such circuits. Customers may still add circuits above those levels, but they will have to pay the non-recurring charge for circuits above the additional 24 percent level. Or, the customer can increase its commitment at no cost and thus have all of its circuits captured within the discount plan.[40]

[40] *Id*. § 7.4.13(D).

EXHIBIT B

PUBLICLY AVALABLE INFORMATION ON COMPETITIVE ACTIVITY FOR SPECIAL ACCESS SERVICES

Set forth below is additional publicly available information regarding the competitive status of CLECs, cable companies, and fixed wireless providers.

Competitive Local Exchange Carriers (CLECs). Beginning in the 1980s and early 1990s, CLECs blanketed areas with demand for special access services with their own fiber facilities. These CLECS grew rapidly, making billions in capital investments in deploying hundreds of thousands of miles of fiber to areas of customer demand.[1] Today, CLECs are "being no less aggressive" in competing for a share of the growing market for these services.[2] As explained by Vertical Systems Group, the "large number of Competitive Providers [*i.e.*, CLECs] selling Ethernet in the U.S." has given customers "an extensive choice of services, price points and delivery options" for these services.[3] Publicly available reports confirm the success CLECs have had in the special access market. Some of AT&T's primary CLEC competitors in this market include:

[1] New Paradigm Resources Group, Inc., Facilities-based CLECs on the Upswing, at 1, *available at* http://www.nprg.com/Media/PDF/36-facilities-based-clecs-on-the-upswing (noting that in 2009, CLECs had deployed 185,000 metro fiber route miles, total capital expenditures of $2.65 billion, and total revenues of $27.9 billion).

[2] Sean Buckley, *Telcos, cable, CLECs continue to address the thirst for on-net fiber connections*, May 18, 2015, http://www.fiercetelecom.com/story/telcos-cable-clecs-continue-address-thirst-net-fiber-connections/2015-05-18.

[3] Vertical Systems Group, 2014 U.S. Competitive Provider Ethernet LEADERBOARD, Mar. 13, 2015, http://www.verticalsystems.com/vsglb/2014-u-s-competitive-provider-ethernet-leaderboard/.

Level 3. Level 3 is the second-largest provider of Ethernet services in the country.[4] It has grown quickly through major acquisitions and consolidation with Global Crossing (2011), IP Networks, Inc. (2013), and TWT (2014).[5] The $3 billion Global Crossing purchase made Level 3 an international powerhouse serving customers in 50 countries and providing connections to over 70 countries.[6] Enterprise-focused TWT served 76 markets in North America with 8,700 intercity fiber route miles and 24,300 metro fiber route miles.[7] Having combined with these entities, Level 3 now has approximately 55,000 route miles of metropolitan fiber networks with approximately 33,000 buildings on-net in 228 markets in North America.[8] Of the company's approximately 52,000 customers worldwide, 96 percent are enterprise customers and

[4] Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD, Aug. 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[5] Level 3 Communications, Inc., Form 10-K, at 5 (SEC filed Feb. 27, 2015), *available at* http://www.sec.gov/Archives/edgar/data/794323/000079432315000003/lvlt-123114_10k.htm; Bank Street News Release, *Level 3 Communications Acquires IP Networks*, May 31, 2013, *available at* http://www.bankstreet.com/uploads/1/7/5/9/17593291/ip_networks_sale_to_level_3_communications_05_31_2013.pdf.

[6] Fierce Telecom, *Level 3 acquires Global Crossing*, Dec. 14, 2011, http://www.fiercetelecom.com/special-reports/most-important-mas-2011/level-3-acquires-global-crossing.

[7] Level 3 Communications, *Level 3 To Acquire tw telecom*, Jun. 16, 2014, *available at* http://s1.q4cdn.com/840339377/files/doc_downloads/Other%20Downloads/LVLT-TWTC_Fact%20Sheet_2014-06-16.pdf.

[8] Level 3 Communications, Inc., *Second Quarter 2015 Results*, at 13, July 29, 2015, *available at* http://investors.level3.com/files/doc_downloads/2Q15-Earnings/2Q15-External-Earnings-Presentation_Final-PDF.pdf (reporting approximately 42,200 total on-net buildings, 79 percent of which are in North America); Consolidated Application – Streamlined Processing Requested, *Applications Filed for the Transfer of Control of TWTC Inc. to Level 3 Communications, Inc.*, WC Docket No. 14-104, at 11 (FCC filed July 8, 2014) ("Following the consummation of the Proposed Transaction [with TWTC], Level 3 estimates that it will have approximately 30,600 on-net buildings in the United States").

four percent are wholesale customers.[9] Level 3's service offerings include Private Line, Ethernet Private Line, Ethernet Virtual Private Line, Virtual Private LAN (VPLS), MPLS/IP VPN, Wavelength services, and managed dedicated fiber services.[10] Level 3 has had rapid growth in its Core Network Services to enterprise customers. Even excluding the TWT revenue, Core Network Services revenue increased in the North American region during the third quarter of 2015 because of growth in revenue from enterprise customers.[11]

Windstream. Windstream Communications ("Windstream") has operations in 48 states and the District of Columbia with approximately 121,000 miles and 27 data centers.[12] The company states that it is the choice of four out of five Fortune 500 companies for data, voice, network, and cloud solutions.[13] The company's enterprise revenues are growing, lead by demand for increased integrated data and voice services.[14] Windstream has grown both by competitively adding customers, and by a series of acquisitions including PAETEC, NuVox,

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[9] Level 3 Communications, Inc., *Second Quarter 2015 Results*, at 13, July 29, 2015, *available at* http://investors.level3.com/files/doc_downloads/2Q15-Earnings/2Q15-External-Earnings-Presentation_Final-PDF.pdf.

[10] Level 3 Communications, *Level 3 Private Line Services*, http://www.level3.com/en/products/private-line-services/; Level 3 Communications, *Level 3 Ethernet Solutions*, at 2, *available at* http://www.level3.com/~/media/files/factsheets/en_ethernet_fs_ethernetmatrix.pdf; Level 3 Communications, *Level 3® Virtual Private LAN Service (VPLS)*, http://www.level3.com/en/products/virtual-private-lan-service/; Level 3 Communications, *Level 3 Managed Dedicated Fiber*, http://www.level3.com/en/products/managed-dedicated-fiber/.

[11] Level 3 Communications, Form 10-Q, at 40 (SEC filed Nov. 6, 2015), *available at* http://d1lge852tjjqow.cloudfront.net/CIK-0000794323/d9c5de22-4952-4587-8e84-d666af99f976.pdf.

[12] Windstream Holdings, Inc., Form 10-K, at 3 (SEC filed Feb. 24, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1282266/000128226615000010/a201410k.htm.

[13] Windstream, *Why Windstream?*, http://www.windstreambusiness.com/why-windstream.

[14] Windstream Holdings, Inc., Form 10-Q, at 48 (SEC filed Nov. 5, 2015) *available at* http://files.shareholder.com/downloads/ABEA-43PVYW/1063030388x0xS1282266-15-50/1585644/filing.pdf.

Hosted Solutions Acquisition, Kentucky Delta Link, Norlight, and Business Only Broadband.[15] Windstream recently stated that it can now serve 1,000,000 locations with its upgraded last mile network facilities, including large numbers of small businesses.[16]

XO. XO Communications, LLC ("XO") is the seventh-largest Ethernet provider.[17] Its network includes more than 13,000 metro route miles in 40 major metropolitan markets in the U.S. and Canada, spanning more than 1.2 million fiber miles with more than 4,000 buildings on-net.[18] Its Ethernet offerings reach more than two million business locations and provide coast-to-coast speeds of up to 100 Gbps.[19] The company states that its customer base includes more than 50 percent of the Fortune 500.[20] XO's service offerings include Dedicated Internet Access and Ethernet Private Lines.[21] XO's wholesale services provide high performance data, IP, and

[15] Windstream Holdings, Inc., Form 10-K, at 4 (SEC filed Feb. 24, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1282266/000128226615000010/a201410k.htm; *Q3 2014 Windstream Holdings Inc Earnings Call – Final*, FD (Fair Disclosure) Wire, Transcript 110614a5502223.723, Nov. 6, 2014, (statement by Windstream CEO Jeff Gardner); Windstream Communications News Release, *Windstream acquires Chicago-based fixed wireless provider*, Oct. 1, 2014, *available at* http://news.windstream.com/article_display.cfm?article_id=1575.

[16] Sean Buckley, *Windstream taps Day to lead consumer and SMB division, sees broadband as growth driver*, Fierce Telecom, Dec. 7, 2015, http://www.fiercetelecom.com/story/windstream-taps-day-lead-consumer-and-smb-division-sees-broadband-growth-dr/2015-12-07.

[17] Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD, Aug. 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[18] XO, *Network Reach*, http://www.xo.com/why/the-right-network/reach/.

[19] XO, *Wholesale Business*, http://www.xo.com/solutions/business/wholesale/; XO, *Network Reach*, http://www.xo.com/why/the-right-network/reach/.

[20] XO, *Careers*, http://www.xo.com/about/careers/.

[21] XO, *Dedicated Internet Access*, http://www.xo.com/network-services/internet-access/dedicated-internet-access/; XO, *Ethernet Private Line*, http://www.xo.com/network-services/ethernet-services/private-line/.

network transport services.[22] The company continues to expand; in 2014, it commenced a $500 million initiative to grow its nationwide network by building out fiber connections.[23]

Zayo. Zayo Group, LLC ("Zayo") markets itself as a global provider of bandwidth infrastructure services.[24] It has grown substantially through a series of acquisitions, at an investment of almost $4 billion.[25] Its fiber network now serves 46 states and Washington, D.C.[26] Zayo has fiber networks in over 300 metro markets and owns approximately 94 percent of its fiber miles, with the remainder under long-term contracts.[27] Zayo's service offerings include leased dark fiber, fiber to cellular towers and small cell sites, dedicated wavelength connections, Ethernet IP connectivity, cloud services, and other high-bandwidth offerings.[28]

Birch. Birch Communications, Inc. is active in over 44 metropolitan areas offering Ethernet over Copper, MPLS and fiber with 200,000 customers in 22 states covering 31,000 route miles,[29] and recently announced its highest level of new organic sales volume in company

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[22] XO, *Wholesale Services*, http://www.xo.com/wholesale/.

[23] Sean Buckley, *XO Takes Success-Based Approach to On-Net Fiber Buildouts*, Fierce Telecom, Sept. 3, 2015, http://www.fiercetelecom.com/story/xo-takes-success-based-approach-net-fiber-buildouts/2015-09-03.

[24] Zayo, *About Zayo*, http://www.zayo.com/company/company-overview.

[25] Zayo Group Holdings, Inc., Form 424(B)(4) Prospectus, at 45-46 (SEC filed Mar. 13, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1608249/000119312515090531/d877708d424b4.htm.

[26] Zayo, *About Zayo*, http://www.zayo.com/company/company-overview.

[27] Zayo Group Holdings, Inc., Form 424(B)(4) Prospectus, at 2 (SEC filed Mar. 13, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1608249/000119312515090531/d877708d424b4.htm.

[28] *Id.*

[29] Birch Communications, Inc., *About Birch*, http://www.birch.com/about; Birch Communications, Inc., *Birch Expands Metro Fiber Services in Key Markets*, Feb. 2, 2015, http://www.birch.com/press-releases/birch-expands-metro-fiber-in-key-markets; Birch Communications, Inc., *Birch Continues To Boost Metro-Fiber Services in Key Markets*, Apr. 20, 2015, http://www.birch.com/press-releases/birch-continues-to-boost-metro-fiber-services-in-key-

history, with a sales increase of over 112 percent.[30] On November 15, 2015, Birch announced "that its latest Metro-Fiber expansion adds another 80,000 new buildings across a 22-state area, bringing the total to more than 400,000 Metro-Fiber buildings nationwide."[31]

EarthLink. EarthLink Holdings Corp. ("Earthlink") is another large and growing provider. It has a nationwide network with 29,421 route fiber miles with 90 metro fiber rings in 25 states serving 150,000 business customers.[32] Its service offerings include high-speed Internet access, IPsec VPN, and Secure Wi-Fi.[33] Earthlink has also grown its enterprise broadband services business through the acquisition of ITC^DeltaCom, Inc. (2010) and One Communications Corp. (2011).[34]

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markets; PR Newswire, *Birch Intensifies Metro-Fiber Initiative, Adds 80,000 Buildings Across a 22-State Area, Company Delivers Bandwidth-Rich Services By Aggressively Expanding Service Footprint*, Nov. 30, 2015, http://www.prnewswire.com/news-releases/birch-intensifies-metro-fiber-initiative-adds-80000-buildings-across-a-22-state-area-300185112.html.

[30] Birch Communications, Inc. Press Release, *Birch Reports Strong Third Quarter Sales Results*, Oct. 27, 2015, http://www.birch.com/press-releases/birch-reports-strong-third-quarter-sales-results; Birch Communications, Inc. Press Release, *Birch Reports Record Second Quarter Sales Results*, July 20, 2015, http://www.birch.com/press-releases/birch-reports-record-second-quarter-sales-results.

[31] PR Newswire, *Birch Intensifies Metro-Fiber Initiative, Adds 80,000 buildings Across a 22-Stte Area, Company Delivers Bandwidth-Rich Services By Agressively Expanding Service Footprint*, Nov. 30, 2015, http://www.prnewswire.com/news-releases/birch-intensifies-metro-fiber-initiative-adds-80000-buildings-across-a-22-state-area-300185112.html.

[32] EarthLink, *Corporate Profile*, http://www.earthlink.net/about/corp/; EarthLink Holdings Corp., Form 10-K, at 1 (SEC filed Feb. 20, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1102541/000110254115000003/elnk-20141231x10k.htm; EarthLink News Release, *EarthLink Announces Completion of Holding Company Formation*, Jan. 2, 2014, *available at* http://ir.earthlink.net/releasedetail.cfm?releaseid=816605.

[33] EarthLink Business, *Network Services – Products*, *available at* http://www.earthlinkbusiness.com/data-services/.

[34] EarthLink Holdings Corp., Form 10-K, at 1 (SEC filed Feb. 25, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1102541/000110254114000005/elnk-20131231x10k.htm.

Cogent. Cogent Communications, Inc. ("Cogent") is a service provider offering on-net services with IP connectivity ranging from 100 Mpbs to 100 Gpbs.[35] Cogent's network reaches 1,354 corporate office buildings in the United States,[36] including what it claims are the most prestigious commercial buildings in the United States.[37] Its primary service offerings include Fast Ethernet; Gigabit Ethernet; 10 Gigabit Ethernet; 100 Gigabit Ethernet; 100 Gigabit Ethernet; Point-to-Point/Point-to-Multi-Point or VLPS; and Colocation with Internet Access.[38]

Others. There are numerous other CLECs offering alternatives to ILEC special access services. For example, GTT Communications, Inc. provides service in 19 large U.S. cities.[39] FiberLight LLC provides fiber-optic based, high performance networking services through its all-optical network with over 1.6 million miles of fiber including in Maryland, Virginia, and

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[35] Cogent, Form 10-K, at 2 (SEC filed Feb. 27, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1158324/000104746915001355/a2223182z10-k.htm#dc17801_item_1._business.

[36] Cogent, *Service Locations – List Search*, http://www.cogentco.com/index.php?continent=North+America&country=United+States&state=&metro=&city=&site_type=&action=search&option=com_content&view=article&id=40&Itemid=. Cogent claims to "directly connect with fiber approximately 1,465 skyscrapers throughout North America, representing 800 million square feet of multi-tenant office space." *Cogent Communications Holdings, Inc. at Goldman Sachs Leveraged Finance Conference – Final*, FD (Fair Disclosure) Wire, Transcript 031115a5634831.731 (Mar. 11, 2015) (statement by Cogent Communications Holdings, Inc. founder and CEO Dave Schaeffer).

[37] Cogent, *Cogent Powered Buildings*, https://www.cogentco.com/en/about-cogent/cogent-powered-buildings.

[38] Cogent, Form 10-K, at 6 (SEC filed Feb. 27, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1158324/000104746915001355/a2223182z10-k.htm#dc17801_item_1._business.

[39] GTT Communications, Inc., *Major Metropolitan Areas*, *available at* http://www.gtt.net/wp-content/uploads/2015/07/1-sided-Major-Metro-Markets-7-14-15.pdf.

Washington, DC.[40] Lumos Network Corp. focuses on business services in the Mid-Atlantic region, including Virginia, West, Virginia, Maryland, Pennsylvania, Ohio and Kentucky,[41] and has approximately 2,560 total on-net locations.[42] Integra Telecom, Inc. is a large provider of communications and networking services in the western United States,[43] with over 3,000 buildings on-net and 85,000 customers.[44] LightSpeed Networks, Inc. focuses on Oregon and Washington[45] and has an on-net footprint in over 75 communities throughout the Northwest that passes over 40,000 business addresses.[46] US Signal Company has 14,000 miles of lit fiber and metro rings in the Midwest[47] and offers private lines from DS1 to OC-192.[48] Consolidated Communications provides business services in California, Texas, Kansas, Pennsylvania, and multiple states in the mid-west and the plains,[49] and has 850,000 connections and 13,441 fiber

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[40] FiberLight LLC, News Release, *FiberLight, LLC Brings Fiber Optic Transport Services to Booming Texas Communities*, Nov. 11, 2014, http://www.fiberlight.com/Resources/News/FiberLight,-LLC-Closes-in-on-Texas-Expansion-Compl.aspx; FiberLight LLC, *High-Performance Network*, http://www.fiberlight.com/Carrier-Solutions/High-Performance-Network.aspx; FiberLight LLC, *FiberLight – Network*, http://www.fiberlight.com/Home.aspx.

[41] Lumos Networks Corp., Form 10-Q, at 8 (SEC filed Aug. 6, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1520744/000152074415000026/lmos-20150630x10q.htm.

[42] Lumos Networks Corp., News Release, *Lumos Networks Officially Launches Hampton Roads/Norfolk Metro as its 24th and Largest Enterprise Market*, Aug. 6, 2015, http://ir.lumosnetworks.com/file.aspx?IID=4293608&FID=30594280.

[43] Integra Telecom, Inc., *About Integra*, http://www.integratelecom.com/about/Pages/default.aspx.

[44] Integra Telecom, Inc., News Release, *Electric Lightwave, Integra Business Drive Expansion as Integra Reaches 3,000 On-Network Locations*, Apr. 16, 2015, http://www.integratelecom.com/about/news/pages/electric-lightwave,-integra-business-drive-expansion-as-integra-reaches-3,000-on-network-locations.aspx.

[45] LightSpeed Networks, Inc., *Home*, http://www.lsnetworks.net/.

[46] LightSpeed Networks, Inc., *Carrier Services*, http://www.lsnetworks.net/products/carrier.

[47] US Signal Company, *Home*, https://ussignal.com.

[48] US Signal Company, *Private Line*, https://ussignal.com/network/private-line.

[49] Consolidated Communications, *About Us*, https://www.consolidated.com/about-us.

route miles.[50] And Lightower Fiber Networks has a network of more than 30,000 route miles of fiber providing access to more than 15,000 service locations, including over 250 data centers, 500+ telco hotels and central offices, 40 financial exchanges, and more than 5,000 wireless towers.[51]

Cable Companies. Cable companies have also invested billions of dollars in their networks to compete for special access customers. Today, cable companies are relying on the strong growth in their business services offerings to offset slow growth in their consumer businesses.[52] Cable companies initially relied mainly on their hybrid-fiber coaxial facilities to serve small and medium sized businesses, in their services areas, which included areas outside urban areas. As they invested in their fiber networks, however, cable companies have expanded rapidly and today offer services to businesses of all sizes, including large enterprises.

Today, "[c]able is the fastest growing segment in the wholesale and retail business Ethernet markets."[53] Vertical Systems Group reports that "'[t]he Cable MSO segment remained the fastest growing overall in 2014, garnering growth that considerably outpaced the Incumbent Carrier and Competitive Provider segments. . . . Already established in metro areas, leading cable companies are fortifying their Ethernet offerings to meet the needs of larger businesses

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[50] *Id.*

[51] Lightower Fiber Networks, Press Release, *Lightower Closes Merger with Fibertech Networks to Double its Network Reach and Strengthen its Position in U.S. Networking Market*, Aug. 13, 2015, http://www.lightower.com/company/news/press-releases/lightower-closes-merger-with-fibertech-networks-to-double-its-network-reach-and-strengthen-its-position-in-u-s-networking-market/#.Vc1llUrD-dI.

[52] *See, e.g.*, Gerry Smith, *Comcast Targets Big Businesses to Offset Consumer TV Defections*, Bloomberg Business, Sep. 16, 2015, http://www.bloomberg.com/news/articles/2015-09-16/comcast-targets-big-businesses-to-offset-consumer-tv-defections.

[53] *E.g.*, Sean Buckley, *Cable hones its wholesale skills in special access, wireless broadband*, Fierce Telecom, Apr. 7, 2015, http://www.fiercetelecom.com/special-reports/cable-hones-its-wholesale-skills-special-access-wireless-backhaul.

with regional and nationwide networks."[54] During a recent two-year period, "cable operators have increased the penetration of business locations they serve by more than 50 percent while ILEC penetration dipped nearly 14 percent."[55]

In addition, cable companies are increasingly competing on a nationwide basis. For example, Comcast recently announced a new arrangement among cable companies to pool network resources to dramatically expand their collective ability to offer large enterprise services at multiple locations, regardless of whether those locations are within or outside any particular cable company's footprint.[56] A Time Warner Cable executive recently explained that Time Warner Cable "will gain as much market share [for business services] as we have the right to win. . . . We are going to have to win customers one customer at a time. But we have the opportunity to do that."[57]

Publicly available reports confirm the success cable companies have had in building out their networks and attracting customers. AT&T regularly competes against cable companies in the Ethernet market. Some of AT&T's primary competitors in this market include:

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[54] Vertical Systems Group, 2014 U.S. Cable MSO Ethernet LEADERBOARD, Mar. 16, 2015, http://www.verticalsystems.com/vsglb/2014-u-s-cable-mso-ethernet-leaderboard/.

[55] Sean Buckley, *Cable operators taking greater share of large businesses, says analyst firm*, Fierce Telecom, Sep. 21, 2015, http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21.

[56] *E.g.*, Shalini Ramachandran, *Comcast to Sell Data Services to Big Firms Nationwide*, Wall Street Journal, Sept. 16, 2015, *available at* http://www.wsj.com/articles/comcast-to-sell-data-services-to-big-firms-nationwide-1442376240; Mari Silbey, *Top MSOs Team for National Enterprise Push*, Light Reading, Dec. 2 2015, http://www.lightreading.com/cable/cable-business-services/top-msos-team-for-national-enterprise-push/d/d-id/719625 (reporting that the top seven cable operators are currently discussing "collaborat[ion] on a national 'cable first' push into enterprise services").

[57] Carol Wilson, *Cable Looking Past AT&T, Verizon*, Light Reading, Dec. 4, 2015, http://www.lightreading.com/cable/cable-business-services/cable-looking-past-atandt-verizon/d/d-id/719679.

Comcast. Comcast is now the sixth largest provider of Ethernet services and is growing.[58] It has been named the fastest growing Ethernet provider in the United States.[59] The company states that Comcast Business is active in 39 states and all but five of the top 25 markets.[60] It has a network consisting of 628,000 route miles, including 141,000 fiber route miles and 125,000 optical nodes.[61] Comcast has multiple business offerings: Comcast Business Internet runs from 16 Mbps downstream/3 Mbps upstream up to 150 Mbps downstream/20 Mbps upstream;[62] Ethernet Dedicated Internet ("EDI") service;[63] and Ethernet private Line and Ethernet Virtual Private Line with speeds of 10 Mbps, 100 Mbps, 1 Gbps, or 10 Gbps.[64] In mid-2015, it was reported that Comcast's Business Services was the first- or second-fastest-growing segment of the company in 15 of the last 16 quarters.[65] In the third quarter of 2015, Comcast's

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[58] Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD, Aug. 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[59] Comcast, *The Fastest Growing Ethernet Provider, Two Years Running*, Comcast Business, Feb. 25, 2015, http://corporate.comcast.com/news-information/news-feed/thefastest-growing-ethernet-provider-two-years-running.

[60] Carl Weinschenk, *Has Cables' Commercial Services Business Reached a Crossroads?*, ITBusinessEdge, Sep. 16, 2105, http://www.itbusinessedge.com/blogs/data-and-telecom/has-cables-commercial-services-business-reached-a-crossroads.html; Comcast, *Comcast Business – The Comcast Network*, http://business.comcast.com/docs/default-source/brochures/the_comcast_network.pdf?sfvrsn=0.

[61] Comcast, *Comcast Business – The Comcast Network*, http://business.comcast.com/docs/default-source/brochures/the_comcast_network.pdf?sfvrsn=0.

[62] Comcast, *Business Internet – Plans & Pricing*, http://business.comcast.com/internet/business-internet/plans-pricing.

[63] Comcast, *Comcast Business – Dedicated Internet Access*, http://business.comcast.com/ethernet/products/dedicated-internet-technical-specifications.

[64] Comcast, *Comcast Business – Ethernet Virtual Private Line*, http://business.comcast.com/ethernet/products/virtual-private-line; Comcast, *Comcast Business – Ethernet Virtual Private Line: Technical Specifications*, http://business.comcast.com/ethernet/products/virtual-private-line-technical-specifications.

[65] Ray Sheffer, *Comcast Business Services: A Consistent Driver of Growth*, Market Realist, May 21, 2015, http://marketrealist.com/2015/05/comcast-business-services-consistent-driver-growth.

Business Service revenue increased 20 percent.[66] In addition, just this year, Comcast has expanded its fiber network for commercial services in several regions."[67] As noted, Comcast has created a new business unit to sell "Internet and phone services to large businesses nationwide, even those located outside its service area, as it seek to steal away more customers from telecom providers like AT&T Inc. and Verizon Communications Inc."[68] Comcast has struck wholesale deals with other cable operators to enable it offer nationwide service.[69]

Time Warner Cable. Time Warner Cable Enterprises LLC ("Time Warner Cable") is the fifth largest Ethernet provider in the country, and its business unit services over 850,000 buildings.[70] Time Warner Cable's service offerings range from broadband with 10 Mbps downstream/1 Mbps upstream to 300 Mbps downstream/20 Mbps upstream.[71] Time Warner Cable also offers Ethernet point-to-point and multipoint-to-multipoint options, with speeds

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[66] Comcast, Press Release, *Comcast Reports 3rd Quarter 2015 Results*, at 1, Oct. 27, 2015, *available at* http://files.shareholder.com/downloads/CMCSA/1002456647x0x856642/C83D4F35-35F2-446F-B005-5E309CDD97E4/3Q15_Earnings_Release_with_Tables.pdf.

[67] Mari Silbey, *Top MSOs Team for National Enterprise Push*, Light Reading, Dec. 2 2015, http://www.lightreading.com/cable/cable-business-services/top-msos-team-for-national-enterprise-push/d/d-id/719625.

[68] Shalini Ramachandran, *Comcast to Sell Data Services to Big Firms Nationwide*, Wall Street Journal, Sept. 16, 2015, *available at* http://www.wsj.com/articles/comcast-to-sell-data-services-to-big-firms-nationwide-1442376240.

[69] Mari Silbey, *Top MSOs Team for National Enterprise Push*, Light Reading, Dec. 2 2015, http://www.lightreading.com/cable/cable-business-services/top-msos-team-for-national-enterprise-push/d/d-id/719625.

[70] *Time Warner Cable Inc. at Morgan Stanley Technology, Media & Telecom Conference – Final*, FD (Fair Disclosure) Wire, Transcript 030514a5305838.738 (Mar. 5, 2014) (statement by Time Warner Cable Inc. EVP and CFO Artie Minson).

[71] Time Warner Cable Business Class, *Business Internet*, http://business.timewarnercable.com/services/internet/business-internet/overview.html.

ranging from 5 Mbps to 10 Gbps and Ethernet Local Area Network services.[72] Time Warner Cable has found great success in this line of business, with revenues doubling from $1.11 billion in 2010 to $2.31 billion in 2013 (with a target of $5 billion by 2018) and accounting for more than ten percent of the company's overall revenue.[73] In the first half of 2015, Time Warner Cable expanded its network to an additional 32,000 commercial buildings.[74]

Cox. Cox Communications, Inc ("Cox") is the eighth largest Ethernet provider in the country, with 25,000 miles of metro fiber deployed including 28,000 fiber lit buildings, 400,000 fiber-near-net buildings, and over 300,000 Hybrid Fiber Coax serviceable buildings.[75] Cox Business serves more than 330,000 customers.[76] Its offered services include Business Internet with speeds ranging from 5 Mbps downstream/1 Mbps upstream to 50 Mbps downstream/10 Mbps upstream[77]; Optical Internet services with symmetrical and scalable bandwidth from 1 Mb

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[72] Time Warner Cable Business Class, *ELAN: Secure, Any-to-Any Connectivity*, http://business.timewarnercable.com/services/network-services/ethernet/ethernet-local-area-network/overview.html.

[73] Forbes, *For Time Warner Cable, How Significant Can Business Services Be?*, Nov. 12, 2014, http://www.forbes.com/sites/greatspeculations/2014/11/21/for-time-warner-cable-how-significant-can-business-services-be/; Time Warner Cable, Inc., Form 10-Q, at 3 (SEC filed July 30, 2015), *available at* https://www.sec.gov/Archives/edgar/data/1377013/000119312515269291/d146752d10q.htm.

[74] Time Warner Cable, *Second-Quarter 2015 Earnings Summary*, at 10, July 30, 2015, *available at* http://ir.timewarnercable.com/files/2015/2Q15/Earnings-Summary-Presentation-2Q15-FINAL.pdf.

[75] Sean Buckley, *U.S. Fiber Penetration Reaches 39.3 Percent of Buildings, Says VSG*, Fierce Telecom, Apr. 4, 2014, http://www.fiercetelecom.com/story/us-fiber-penetration-reaches-393-percent-buildings-says-vsg/2014-04-04.

[76] K.C. Neel, *Business Services Replenish Coffers*, Multichannel News, Dec. 1, 2014, http://www.multichannel.com/news/technology/business-services-replenish-coffers/385901.

[77] Cox Business, *Cox Business Internet – Overview*, http://www.cox.com/business/data/business-internet.cox.

to 10 Gb[78]; Metro Ethernet with speeds ranging from 256 Kbps to 1 Gbps or higher[79]; private line service[80]; and MPLS IP-VPN service.[81]

Charter. Charter Communications, Inc.'s Spectrum Business has deployed more than 65,000 route miles of fiber across 28 states and connects to more than 12,000 buildings and 3,800 cell towers.[82] The company had 416,000 commercial customer relationships as of mid-2015.[83] Charter is seeking approval of a merger with Time Warner and expects to invest at least $2.5 billion to build-out its network into new commercial areas.[84] Charter has several product offerings: Business Internet services from 60 Mbps downstream/4 Mbps upstream to 100 Mbps downstream/7 Mbps upstream[85]; Fiber Optic Internet at speeds up to 10 Gbps[86]; Ethernet Private Line and Ethernet LAN at symmetric speeds up to 5 Mbps or asymmetric speeds up to 30 Mbps

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[78] Cox Business, *Cox Optical Internet*, *available at* https://www.cox.com/content/dam/cox/business/documents/internet/Cox_Business_Optical_Internet_Overview.pdf.

[79] Cox, *Cox: Dedicated to Serving Local Communities*, *available at* https://www.cox.com/content/dam/cox/business/documents/resource-center/Metro-Ethernet_Data_Sheet.pdf.

[80] Cox Business, *Cox Private Line*, http://www.cox.com/wcm/en/business/datasheet/ds-private-line.pdf?campcode=xl_data_8_0908.

[81] Cox Business, *MPLS IP-VPN – Overview*, http://www.cox.com/business/data/mpls-ip-vpn.cox.

[82] Spectrum Business, *Carrier Solutions*, https://business.spectrum.com/content/carrier; Spectrum Business, *Spectrum Business Network Map*, https://business.spectrum.com/mediacontent/pdfs/spectrum-business-national-map-2014.pdf.

[83] Charter Communications, Inc., Form 10-Q, at 27 (SEC filed Aug. 4, 2015), *available at* https://www.sec.gov/Archives/edgar/data/1091667/000109166715000185/chtr63015-10q.htm.

[84] Public Interest Statement, *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, at 18 (FCC filed June 25, 2015).

[85] Spectrum Business, *High-Speed Internet*, https://business.spectrum.com/content/high-speed-internet.

[86] Spectrum Business, *Fiber Optic Internet*, https://business.spectrum.com/content/fiber-internet.

downstream/3 Mbps upstream[87]; and Metro Ethernet service that connects two or more commercial customers with services up to 10 Gbps. Charter's Spectrum Business' revenue grew 13.2 percent to $286 million in the third quarter of 2015.[88]

Cablevision. Cablevision Systems Corp.'s provides business services through its Lightpath unit, which has an advanced fiber network extending 317,000 miles of fiber throughout the New York metropolitan area and 7,400 buildings in its network.[89] Lightpath has several enterprise broadband offerings including: Metro Ethernet; Optical Transport Service; Internet; and Managed Services.[90] In the third quarter of 2015, Lightpath earned $91.2 million in revenue, an increase of 3.8 percent.[91]

Bright House. Bright House Networks LLC ("Bright House") has over 135,000 unique business customer relationships and provides fiber services to more than 4,000 business locations.[92] Its business service offerings include video, Broadband Internet, Dedicated Internet

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[87] Spectrum Business, *Ethernet – Coax Ethernet*, https://business.spectrum.com/content/business-ethernet#coax.

[88] Charter Spectrum, *Charter Announces Third Quarter 2015 Results*, at 4, Oct. 29, 2015, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=2104101.

[89] Cablevision Systems Corp., Form 10-K, at 6 (SEC filed Feb. 25, 2015), *available at* http://www.sec.gov/Archives/edgar/data/784681/000162828015001010/cvc-12312014x10k.htm; *Q4 2014 Cablevision Systems Corp Earnings Call – Final*, FD (Fair Disclosure) Wire, Transcript 022515a5609074.774, Feb. 25, 2015, (statement by Cablevision Systems Corporation Vice Chairman and CEO Gregg Seibert).

[90] Lightpath, *Lightpath Metro Ethernet*, https://golightpath.com/metro-ethernet.

[91] Cablevision, *Cablevision Systems Corp. Reports Third Quarter 2015 Results*, at 2, Nov. 3, 2015, *available at* http://www.cablevision.com/pdf/news/110315.pdf.

[92] Sean Buckley, *Charter's Bright House deal could further disrupt competition in the Ethernet business services market*, Fierce Telecom, Apr. 2, 2015, http://www.fiercetelecom.com/story/charters-bright-house-deal-could-further-disrupt-competition-ethernet-busin/2015-04-02; Bright House Networks, *Bright House Networks Connects Orange County Public Schools*, https://enterprise.brighthouse.com/content/dam/bhn/ent/news/FL%20Trend%20Advertorial%202013.01%20OCPS.pdf.

Access, Metro Ethernet Data Services with upload and download speeds of 10 Gbps, Voice services, and ancillary services such as audio conferencing.[93] In 2014, Bright House reported business revenue growth of 19 percent.[94]

Suddenlink. Suddenlink Communications has deployed "a growing, fiber-rich" 14,000-mile network "with last-mile connectivity."[95] As of the end of 2014, Suddenlink served "63,700 commercial data customers."[96]

In addition to these large cable operators, which have rapidly established themselves as major players in the market for Ethernet service, there are additional, local and regional cable operators that also offer special access services in particular markets.

Fixed Wireless. Fixed wireless continues to compete for special access customers. Fixed wireless allows business services to be delivered between points over available radio spectrum, relying far less on capital intensive fiber or other line installation. Access to fixed wireless broadband is growing.[97] About one quarter of the U.S. population now has access to

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[93] Bright House Networks, *Bright House Networks Connects Orange County Public Schools*, https://enterprise.brighthouse.com/content/dam/bhn/ent/news/FL%20Trend%20Advertorial%202013.01%20OCPS.pdf; Bright House Networks Enterprise Solutions, *Metro Ethernet*, http://enterprise.brighthouse.com/solutions/data/metro-ethernet.html.

[94] Sean Buckley, *Charter's Bright House deal could further disrupt competition in the Ethernet business services market*, Fierce Telecom, Apr. 2, 2015, http://www.fiercetelecom.com/story/charters-bright-house-deal-could-further-disrupt-competition-ethernet-busin/2015-04-02.

[95] Cequel Communications Holdings I, LLC, *Annual Report for the Year Ended December 31, 2014*, at 4, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTcwNTE2fENoaWxkSUQ9MjcxNjY3fFR5cGU9MQ==&t=1; Suddenlink Business, *Carrier*, http://www.suddenlinkbusiness.com/carrier; Suddenlink Business, *Ethernet*, http://www.suddenlinkbusiness.com/ethernet.

[96] Cequel Communications Holdings I, LLC, *Annual Report for the Year Ended December 31, 2014*, at 11, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTcwNTE2fENoaWxkSUQ9MjcxNjY3fFR5cGU9MQ==&t=1.

[97] NTIA, *U.S. Broadband Availability: June 2010-June 2012*, at 10 (May 2013), *available at* https://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.

fixed wireless at download speeds of six Mbps.[98] Broadband Now maintains a list of fixed wireless broadband providers in the United States and it numbers over 1,100, all with varying-sized service populations and data speeds.[99]

XO, the nation's seventh largest provider of Ethernet services,[100] also has a vibrant fixed wireless business. XO views fixed wireless as an alternative last-mile access solution without requiring direct fiber access or as a redundant solution that complements a wireline connection.[101] The speeds offered range from 10 Mbps to 1 Gbps.[102]

Windstream entered the fixed wireless market when it acquired Business Only Broadband in 2014. Windstream views fixed wireless as an access alternative for businesses.[103] Business Only Broadband only served four markets and Windstream has already begun expanding the service, deploying to Boston in mid-2015.[104]

43. Towerstream Corp. provides fixed wireless service in 12 major markets including New York, Boston, Los Angeles, Chicago, San Francisco, Miami, Seattle, Dallas/Fort Worth,

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[98] *Id.* at 4.

[99] Broadband Now, *Fixed Wireless Broadband Providers in the USA*, http://broadbandnow.com/Fixed-Wireless-Providers/2.

[100] Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD, Aug. 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[101] XO, *Get the Speed of Fiber without Direct Fiber Access*, http://www.xo.com/network-services/private-line-services/fixed-broadband-wireless-access/.

[102] *Id.*

[103] Sean Buckley, *Windstream acquires Business Only Broadband, adds fixed wireless to service mix*, Fierce Telecom, Oct. 2, 2014, http://www.fiercetelecom.com/story/windstream-acquires-business-only-broadband-adds-fixed-wireless-service-mix/2014-10-02.

[104] Sean Buckley, *Windstream brings fixed wireless service to Boston, deepens alternative Ethernet access reach*, Fierce Telecom, July 16, 2015, http://www.fiercetelecom.com/story/windstream-brings-fixed-wireless-service-boston-deepens-alternative-etherne/2015-07-16.

Houston, Philadelphia, and Las Vegas.[105] The company's fixed wireless business is growing. During the third quarter of 2015 it connected 55 buildings, with 1,527 potential customers, to its fixed wireless system.[106]

Rise Broadband is another provider of fixed wireless service. According to its website, Rise Broadband is the largest fixed wireless provider in the country, serving nearly 200,000 residential and commercial customers in rural and suburban regions across 16 states.[107] Rise Broadband offers fixed wireless speeds of between 3 Mbps and 1 Gbps.[108]

[105] Towerstream, *About Towerstream*, http://www.towerstream.com/company.

[106] Towerstream, *Towerstream Reports Third Quarter 2015 Results and Business Update*, Nov. 9, 2015, http://ir.towerstream.com/releasedetail.cfm?ReleaseID=941636.

[107] Rise Broadband, *Fact Sheet*, http://risebroadband.com/about-us/rise-broadbrand-fact-sheet/. These states include Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, South Dakota, Texas, Utah, Wisconsin, and Wyoming. *Id*.

[108] *Id*.

ATTACHMENT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

DECLARATION OF
PARLEY CASTO

QUALIFICATIONS AND BACKGROUND

1. My name is Parley Casto. My current title is Assistant Vice President ("AVP") Contracting and Sourcing. I am responsible for AT&T's purchases of dedicated special access and other local transport services within the domestic United States in support of AT&T's wireline and wireless business requirements. Prior to becoming AVP Contracting and Sourcing, I was Assistant Vice President – AT&T Strategic Marketing for AT&T Inc. In that position, I was responsible for all aspects of pricing for AT&T Wholesale products and services to interexchange carriers, wireless customers, content providers, Competitive Local Exchange Carriers ("CLECs") and Internet Service Providers ("ISPs").

2. I have also held multiple other positions within AT&T. These other positions include Sales Vice President for AT&T Wholesale and Executive Director – Industry Markets Special Access Product Management for SBC. In the latter position, I was responsible for product management, rate development, policy development, and tariff management for the wholesale special access business of SBC on an enterprise-wide basis. Prior to holding these positions, I served as Director of various other product management organizations within SBC.

In those positions, I supervised product management teams responsible for switched access, advanced services, and certain transport (special access and unbundled network element). I also was responsible for SBC's enterprise-wide product development, rate development, and company policy for these products.

3. I received my BA from DePaul University in Chicago, Illinois in 1999 and my MBA from DePaul University in 2002. I also earned a Telecommunications Certificate in telecommunications traffic management and engineering from DePaul University's School of Computer Science, Telecommunications and Information Systems. I began working for Illinois Bell Telephone Company in 1992 in the network services organization in Chicago, Illinois.

PURPOSE AND SUMMARY

4. A large portion of AT&T's customers are located outside of AT&T's local exchange carrier ("ILEC") footprint. When AT&T provides services to these out-of-region customers, AT&T operates as a CLEC or inter-exchange carrier ("IXC") or sometimes both. Accordingly, AT&T must either build facilities to reach those customers or purchase special access services from the ILEC or a competitive provider. The purpose of this declaration is to demonstrate that AT&T is not constrained in its ability to attract substantial business from customers located outside of its ILEC footprint and that AT&T can typically choose from multiple competitive providers of special access services when purchasing service in those areas. In addition, as explained below, when AT&T enters into contracts to purchase special access services from non-ILEC providers (*e.g.*, competitive local exchange carriers and cable companies), those contracts are often less flexible than the AT&T tariff pricing plans being investigated in this proceeding. CLEC offerings often contain term plans with higher early termination liability than in AT&T's tariff pricing plans, and contain commitment plans with shortfall penalties that are similar to those used in AT&T's tariff pricing plans.

I. THERE ARE NUMEROUS ALTERNATIVES TO ILEC SPECIAL ACCESS SERVICES.

5. AT&T often operates as a CLEC when it provides services outside of its ILEC footprint. In those areas, AT&T must compete against the ILEC, other CLECs, cable companies, fixed wireless providers, and others to win customers.

6. When AT&T wins customers outside of its ILEC footprint, AT&T must determine the most efficient way to provide the dedicated connections needed to serve those customers. AT&T has multiple options in this respect. AT&T can build out its own facilities. AT&T can purchase special access services from the ILEC. And AT&T can purchase special access alternatives from a CLEC, cable company or other competitive provider.

7. I understand that it has been asserted that the terms and conditions in the ILEC tariff pricing plans under investigation in this proceeding have "locked in" customers such that there is insufficient demand to justify network investment by competitors. That has not been AT&T's experience. AT&T competes for and wins substantial business outside of its ILEC footprint. And AT&T has made substantial investments to dramatically expand its out-of-footprint facilities-based network to serve business customers and to supply backhaul to AT&T's cell towers. AT&T today has facilities in every major metropolitan area in the U.S. outside of its ILEC footprint.

8. I also understand that it has been asserted that CLECs lack alternatives to ILEC special access services. Again, that has not been AT&T's experience. In AT&T's experience, there are typically multiple competitive options to the ILEC's special access services. And the number of those alternatives continues to grow.

9. During the past decade, the industry has been shifting away from TDM-based services to Ethernet services, which are a substitute for TDM-based services. Ethernet services

also have certain advantages over traditional TDM-based services in terms of flexibility and cost. There are no incumbents for Ethernet services, because no entity had a pre-existing nationwide Ethernet network. Instead, multiple entities, using various facilities, have aggressively deployed Ethernet services throughout the country to compete for the growing demand for Ethernet services.

10. Today, the marketplace for Ethernet services is highly competitive. According to a recent industry analysis, there are eight Ethernet providers (measured in port share) that have market share over 5 percent, and none has a market share over 18 percent.[1] Together, these top eight providers have about an 80 percent share of the marketplace, and numerous other competitors comprise the remaining 20 percent.[2] Of the top eight providers, three are cable companies and two are CLECs.[3] Level 3, a CLEC, occupies the number two position.[4] It has also been reported that "U.S. Ethernet port growth in the first half of 2015 was unprecedented, easily surpassing estimates" and there "are few indications of the typical slowing growth patterns expected for a market of this size and maturity."[5] One of the "[p]rimary growth drivers" identified for Ethernet has been the "massive migration from TDM to Ethernet services."[6]

11. AT&T's experience when purchasing services outside of its wireline footprint is consistent with the substantial growth in competitive alternatives to TDM-based services. In my experience, AT&T can typically choose to purchase either a TDM-based service or an Ethernet service from a number of alternative providers or by purchasing non-special access transport

[1] Vertical Systems, Mid-2015 U.S. Port Share (2015).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

services. In my experience, for the vast majority of AT&T's demand for special access services outside of its ILEC footprint, AT&T can use a combination of its own competitive facilities, non-special access transport facilities, and services purchased from non-ILEC providers, which can either use or expand its existing facilities. Where Ethernet is an option, AT&T is typically choosing Ethernet services over legacy TDM-based services.

12. AT&T does not have a comprehensive map showing the full coverage of every competitor. However, AT&T does maintain a system that tracks the location of its out-of-region facilities and those of certain CLECs and cable companies. The information that AT&T has for competitive CLECs and cable companies is not all inclusive. These data include only those locations where AT&T currently uses the facilities of competitive providers, or where competitive providers have self-reported an ability to service a location, either because they already have facilities at the location or because they are willing to build to that location. In many cases, the data reported to AT&T are incomplete.

13. Nonetheless, these data show that, outside of AT&T's ILEC footprint, AT&T has an alternative to ILEC special access services at the vast majority of the locations where AT&T has demand for special access services. These data show that in the CenturyLink, Verizon, and Frontier regions, AT&T can typically choose from among more than 20 different competitive suppliers of special access services, including, among others, Comcast, Charter, Cox, Time Warner Cable, Cablevision Lightpath, Brighthouse, Level 3, Zayo Group, Fiber Link, Lumos, Bluebird Networks, LightTower Fiber Networks, Costreet Communications, Enventis, Florida Power and Light, and Oxford Networks. Further, these data show, for example, that AT&T, cable company or CLEC facilities are available for nearly **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY CONFIDENTIAL]** percent of the circuits AT&T

currently uses to provide service to business customers in the Verizon region. The coverage is even greater in metropolitan CBSAs (Core Based Statistical Areas). For example, in the Tampa-St. Petersburg Clearwater, FL CBSA, this limited data confirms that there are competitive alternatives for more than **[BEGIN HIGHLY CONFIDENTIAL]** ▉ **[END HIGHLY CONFIDENTIAL]** percent of AT&T's special access spend in that CBSA; in the Las Vegas-Henderson-Paradise, NV CBSA there are competitive alternatives for nearly **[BEGIN HIGHLY CONFIDENTIAL]** ▉ **[END HIGHLY CONFIDENTIAL]** percent of AT&T's special access spend in that CBSA. As noted, these data understate the true extent of alternative facilities, and in my experience, even where the current system does not currently identify a non-ILEC competitor, AT&T is often able to identify a non-ILEC competitor for that location.

14. AT&T also separately tracks competitive alternatives for backhaul services at AT&T cell sites located outside of AT&T's ILEC footprint. When AT&T purchases backhaul in such areas, it typically does so by issuing a Request for Proposal ("RFP") from providers. AT&T has received responses to these RFPs from over a hundred different providers, and these responses confirm that there are competitive alternatives to ILEC special access services at the substantial majority of AT&T cell sites. For example, according to AT&T's RFP data, nearly **[BEGIN HIGHLY CONFIDENTIAL]** ▉ **[END HIGHLY CONFIDENTIAL]** percent of all of AT&T's cell sites in the Verizon region can be served by competitive alternatives to Verizon's special access services. Again, these data understate the full availability of competitive alternatives, because they reflect only data for those competitors who have responded to an AT&T RFP.

II. TERMS AND CONDITIONS OFFERED BY AT&T's NON-ILEC SUPPLIERS ARE SIMILAR TO TERMS AND CONDITIONS UNDER INVESTIGATION IN THIS PROCEEDING.

15. AT&T has entered into contracts for the purchase of dedicated facilities with dozens of competitive providers. These contracts often contain term discounts with early termination liability, and some contain portability provisions. The terms and conditions in these negotiated contracts are often very similar to the terms and conditions in the AT&T tariff pricing plans under investigation in this proceeding and, in many instances, AT&T's tariff pricing plans offer greater flexibility.

16. A significant portion of the contracts under which AT&T purchases dedicated services (including DS-1 level services) from non-ILECs contain only term-based discounts with early termination liability. As such, they lack the greater flexibility of AT&T's special access tariffs which permit customers to purchase *either* under the same types of term-based discounts with early termination liability *or* under portability plans that permit customers to disconnect circuits without incurring early termination liability as long as they maintain a certain overall number of circuits with AT&T.

17. Moreover, the early termination liability in the contracts under which these competitors sell dedicated services to AT&T can actually be higher than those in AT&T tariff pricing plans. For example, the early termination liability under AT&T's DS1 TPP pricing plan is equal to 40 percent of the month-to-month rate for the service multiplied by the number of months remaining in the term. By contrast, the contract under which AT&T purchases service from one major provider imposes early termination liability equal to the full monthly recurring charge for the circuits for the first 12 months of the service term plus 50 percent of the monthly recurring charge for months 13 through the end of the term. Moreover, if the service provided to AT&T uses an off-net facility, AT&T is required to pay any early termination liability incurred

by the provider associated with that facility. Thus, whereas AT&T charges 40 percent of the month to month rate for the remaining term, this provider charges 100 percent for the first 12 months, 50 percent for the months 13 to the end of the term, plus (for off-net circuits) potential substantial additional fees.

18. The agreement AT&T has with another major provider has similar early termination liability provisions. Under that agreement, if AT&T cancels a circuit prior to the expiration of the term, AT&T is required to pay back the amount of discounts that it would otherwise have received for its purchases of circuits for the period between the termination date and the expiration date of the contract, plus AT&T must reimburse the provider for any termination charges that the provider incurs as a result of AT&T's early termination. Again, depending on the circumstances, the early termination liability under this agreement can be substantially higher than under the AT&T tariff pricing plans that are under investigation in this proceeding.

19. Similarly, the agreement that AT&T has with yet another major provider states that, if AT&T commits to order a service (including Ethernet) for a particular term, but terminates the service "for convenience" prior to the expiration of the term, AT&T must pay a termination charge equal to the sum of: (1) all unpaid amounts for the service provided through the date of termination; (2) any third-party termination charges paid by provider; and (3) a specified percentage of the remaining monthly recurring charges through the end of the service term. The percentage varies according to the month in which the service is terminated.[7] Again,

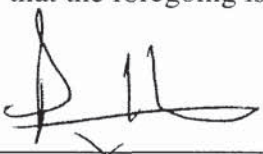
[7] AT&T must pay 100 percent of the monthly recurring charges ("MRCs") for the first 12 months of the service term, 75 percent of the MRCs for months 13 through 24, and 50 percent of the MRCs through the remainder of the term. Any service provided to an off-net building will have an early termination fee equal to the sum of 100 percent of the remaining MRCs through the end of the service term.

however, the early termination liability ("ETL") imposed by this provider can far exceed those under the AT&T tariff pricing plans under investigation in this proceeding.

20. As noted, most of AT&T's contracts to purchase services from competitive suppliers do not have portability options. However, for those contracts that do offer a type of portability, the terms and conditions in the AT&T tariff pricing plans under investigation compare favorably. For example, under one such agreement, AT&T is required to pay, for each year of the 5-year agreement, a "Total Revenue Commitment" on a take-or-pay basis, which means that AT&T must pay the Total Revenue Commitment, even if AT&T's purchases under the contract are less than the Total Revenue Commitment. This approach is similar to the approach used in AT&T's portability tariffs, which typically require the customer to pay for all committed circuits even if they fall short in a particular month.

VERIFICATION

I hereby swear under penalty of perjury that the foregoing is true and correct.



/s/
Parley Casto

Dated: January 8, 2016

ATTACHMENT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

Declaration of

Dennis Carlton, Mark Israel, Allan Shampine & Hal Sider

January 7, 2016

CONTENTS

I. QUALIFICATIONS, ASSIGNMENT, AND SUMMARY OF OPINIONS

A. QUALIFICATIONS

Dennis W. Carlton

1. I am the David McDaniel Keller Professor of Economics at the Booth School of Business of The University of Chicago. I received my A.B. in Applied Mathematics and Economics from Harvard University and my M.S. in Operations Research and Ph.D. in Economics from the Massachusetts Institute of Technology. I have served on the faculties of the Law School and the Department of Economics at The University of Chicago and the Department of Economics at the Massachusetts Institute of Technology. I specialize in the economics of industrial organization. I am co-author of the book *Modern Industrial Organization*, a leading text in the field of industrial organization, and I also have published over 100 articles in academic journals and books, including articles on telecommunications policy and antitrust, and have spoken on those topics as well. In addition, I serve as Co-Editor of the *Journal of Law and Economics*, a leading journal that publishes research applying economic analysis to industrial organization and legal matters; serve on the Editorial Board of *Competition Policy International*, a journal devoted to competition policy; and serve on the Advisory Board of the *Journal of Competition Law and Economics*. I have also served as an Associate Editor of the *International Journal of Industrial Organization* and *Regional Science and Urban Studies*, and on the Editorial Board of *Intellectual Property Fraud Reporter*. I was designated the Distinguished Fellow of the Industrial Organization Society for 2014.

2. In addition to my academic experience, I served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice from October 2006 through January 2008. I also served as a Commissioner of the Antitrust Modernization

Commission, created by Congress to evaluate U.S. antitrust laws. I have served as a consultant to the Department of Justice and Federal Trade Commission on the Horizontal Merger Guidelines, as a general consultant to the Department of Justice and Federal Trade Commission on antitrust matters, and as an advisor to the Bureau of the Census on the collection and interpretation of economic data.

3. I also am a Senior Managing Director of Compass Lexecon, a consulting firm that specializes in the application of economics to legal and regulatory issues and for which I served as President (of Lexecon) for several years. I have provided expert testimony before various U.S., state and federal courts, the U.S. Congress, a variety of state and federal regulatory agencies and foreign tribunals and have submitted testimony on several matters involving telecommunications.

Mark A. Israel

4. I am an Executive Vice President at Compass Lexecon, an economic consulting firm, as well as Managing Director of Compass Lexecon's Washington, D.C. office. From August 2000 to June 2006, I served as a full-time member of the faculty at Kellogg School of Management, Northwestern University. I received my Ph.D. in economics from Stanford University in 2001.

5. I specialize in the economics of industrial organization—which is the study of competition in imperfectly competitive markets, including the study of antitrust and regulatory issues—as well as applied econometrics. At Kellogg and Stanford, I taught graduate-level courses covering topics including business strategy, industrial organization economics, and econometrics. My research has been published in leading economics journals including the

American Economic Review, the *RAND Journal of Economics*, the *Review of Industrial Organization, Information Economics and Policy*, and *Antitrust Source.*

6. I have been a consultant at Compass Lexecon since 2006. My work has focused on the application of econometric methods and theoretical models to competitive analysis of the impact of mergers, antitrust issues including a wide variety of single-firm and multi-firm conduct, class certification, and damages estimation. My work has involved a range of industries including wireless telecommunications, cable television, other high technology industries, beverage distribution, airlines, railroads, retail, financial markets, pharmaceuticals, and publishing. I have submitted expert reports, declarations, and affidavits to government agencies and federal courts on behalf of a wide range of clients.

Allan L. Shampine

7. I am an Executive Vice-President of Compass Lexecon, an economic consulting firm. I received a B.S. in Economics and Systems Analysis s*umma cum laude* from Southern Methodist University in 1991, an M.A. in Economics from the University of Chicago in 1993, and a Ph.D. in Economics from the University of Chicago in 1996. I have been with Compass Lexecon (previously Lexecon) since 1996. I specialize in applied microeconomic analysis and have done extensive analysis of a variety of industries, with a particular focus on technological innovation. I am the editor of the book *Down to the Wire: Studies in the Diffusion and Regulation of Telecommunications Technologies,* and I have published a variety of articles on the economics of telecommunications, network industries, patents and technology diffusion, and on antitrust issues. I am an editor of the American Bar Association journal *Antitrust Source*. I have previously provided economic evidence to the United States Federal Communications Commission, International Trade Commission, state public utility commissions, Federal

Maritime Commission, United States district court, European Commission, Korean Fair Trade Commission, Chinese National Development & Reform Commission, the Info-Communications Development Authority of Singapore, and the Australian Competition & Consumer Commission.

Hal S. Sider

8. I am an Executive Vice-President of Compass Lexecon. I received a B.A. in Economics from the University of Illinois and a Ph.D. in Economics from the University of Wisconsin (Madison). I have been with Compass Lexecon (formerly Lexecon) since 1985, having previously worked in several U.S. government positions. I specialize in applied microeconomic analysis and have performed a wide variety of economic and econometric studies relating to industrial organization, antitrust, and competition issues. I have published a number of articles in professional economics journals on a variety of topics and have testified as an economic expert on matters relating to industrial organization and antitrust, among other topics. In addition, I have provided economic testimony on a variety of telecommunications issues before the FCC and various state public utility commissions.

9. Each of us has previously filed declarations on issues related to special access services in related proceedings. Specific references to our prior declarations are footnoted in the body of this declaration as appropriate.

B. ASSIGNMENT

10. We have been asked by counsel for AT&T to evaluate, based on economic theory and available evidence, Complainants' claims that the AT&T tariffed pricing plans being

investigated by the Commission "lock up substantial proportions of carrier and end-user demand"[1] resulting in harm to competition.

C. SUMMARY OF OPINIONS

11. Our principal conclusion is as follows. Marketplace evidence and economic theory refute the claim that the AT&T tariffed pricing plans under investigation harm competition by foreclosing rival CLECs.[2] There is no competitive rationale for regulators to dictate the terms and conditions of these offerings.

12. Our principal conclusion is supported by the following more detailed findings, each of which is discussed in more detail in the remainder of this declaration.

- *Marketplace data directly refute a key predicate of Complainants' argument: that customers' reliance on circuit portability results in the lock-up of sufficient volume to harm significantly CLECs' ability to compete*. The theory of competitive harm from foreclosure advanced by Complainants *requires* that circuit portability – the contract element offered by AT&T in exchange for a volume commitment – be sufficiently important that enough special access customers will accept the volume commitment for a sufficiently large portion of available demand that CLECs are either deterred from entering or expanding their networks, thus resulting in higher prices for special access services. Available data demonstrate that this "sufficient volume lock-up" condition is far from being met here; hence it follows that the AT&T tariffs at issue cannot have harmed competition.

1. FCC, Order Initiating Investigation and Designating Issues for Investigation, WC Docket No. 15-247, October 16, 2015 (Order), ¶6.
2. Like AT&T, CLECs are often both suppliers of special access and consumers. We generally refer to special access customers as "customers" and special access suppliers as CLECs to make clear what roles we refer to.

- *Contrary to claims that AT&T's portability plans (the only AT&T tariffed pricing plans under investigation) for TDM DS-1 services have harmed competition, there has actually been rapid displacement of AT&T's TDM DS-1 services by new technologies in recent years.* AT&T's monthly TDM DS-1 sales revenue from non-affiliates fell by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent between January 2013 and October 2015, with many customers abandoning TDM DS-1 services in favor of Ethernet and related services. Since the end of 2013, monthly TDM DS-1 sales revenue from non-affiliates fell by about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Ethernet is not tariffed and is provided by a wide variety of CLECs, including Complainants. Complainants do not explain how one can reconcile claims that TDM DS-1 customers are "locked up" with the rapid observed decline in AT&T's TDM DS-1 revenues.
- *Complainants' foreclosure concerns are not credible in light of (i) the relatively small volumes that are even conceivably "locked up" by the portability options at issue, and (ii) the relatively large volumes of AT&T sales that can be diverted to rivals without generating early termination or shortfall liabilities.* In particular:
    - *The portability plans account for a relatively small volume of all revenue in the special access marketplace as defined by the Commission. Complainants' assertion that AT&T's portability option results in anticompetitive foreclosure is inconsistent with the facts. Overall, as of 2013, AT&T's portability customers account for only about 10 percent of all special access revenue in its region, after recognizing that (i) TDM services account for only 60 percent*

of special access services; (ii) CLECs provide roughly one-third of TDM services; (iii) DS-1 services account for roughly **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *of AT&T's TDM services and (iv) roughly* **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *of AT&T's DS-1 customers purchase services under the portability option. The on-going decline in DS-1 service since the end of 2013 implies that AT&T's portability customers account for less than 10 percent of all special access sales.*

- *Even examining only the portion of special access sales of TDM-based DS-1 services in AT&T's region confirms that a large fraction of AT&T's DS-1 sales can be diverted to rivals without penalty.* Roughly **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's DS-1 sales to non-affiliates are not subject to portability (*i.e.*, plans with volume commitments) or term commitments and thus can be diverted to rivals without early termination or shortfall liabilities each year. This volume is roughly equal to 30 percent of CLECs' estimated total current DS-1 sales volume, and so represents a large pool of demand for rivals to serve, particularly when expressed relative to the size of any given CLEC. Moreover, even for the DS-1 volume that is covered by the portability/volume commitment option, many customers have substantial "headroom" that can be diverted to rivals without generating early termination or shortfall liabilities.

- *The widespread entry and expansion of CLECs in recent years is inconsistent with Complainants' claims that the AT&T tariffs under investigation have foreclosed*

AT&T's rivals and harmed competition. CLECs have deployed fiber facilities in a large number of metropolitan areas that maximize proximity to customers and facilitate CLECs' ability to provide access services as well as retail services, with CLECs routinely deploying last mile facilities to do so. Consistent with the rapid transition away from TDM DS-1 services described above, CLECs are, in large part, meeting the underlying demand for data services using newer technologies such as Ethernet.

- *The terms and conditions used by AT&T in particular refute Complainants' theories about competitive harm from foreclosure.*
    - Volume commitments in AT&T's contracts are made over large geographic areas, so special access customers with available "headroom" can concentrate that headroom in specific geographic areas to facilitate entry or network expansion of rivals in that area.
    - CLECs, which the FCC would presumably acknowledge lack significant market power, utilize contracts that include terms and conditions that are similar to those in the AT&T tariffs under investigation. This demonstrates that there are legitimate business purposes for such contract terms and refutes any necessary connection between these terms and anticompetitive foreclosure.
- *The economic literature cited by the Commission does not support a claim that the AT&T tariffs at issue harm competition by foreclosing rivals.*
    - *The economic literature cited by the Commission explicitly recognizes that such practices raise concerns under only limited circumstances and that, in*

many cases, business practices such as exclusive dealing and conditional pricing are pro-competitive and serve legitimate business purposes.

- *Contracting practices in the special access marketplace are substantially different than those analyzed in the economic literature, a point the Commission itself recognizes.* Most importantly, as we have already highlighted, the AT&T tariffs do not meet the conditions for competitive concerns raised in the economic literature because there is plenty of available demand for AT&T's rivals to serve. In addition, the AT&T tariffs at issue do not "reference rivals," are not "loyalty discounts" and do not require customers to purchase exclusively from AT&T.

II. COMPLAINANTS' FORECLOSURE THEORIES ARE CONTRADICTED BY THE FACTS OF THE SPECIAL ACCESS MARKETPLACE

A. FORECLOSURE THAT RESULTS IN HARM TO COMPETITION MUST BE DISTINGUISHED FROM THE "FORECLOSURE" THAT IS THE INEVITABLE RESULT OF THE COMPETITIVE PROCESS

13. The Commission's Order focuses on claims by certain CLECs ("Complainants") that the AT&T tariff pricing plans under investigation "lock up substantial portions of carrier and end-user demand, which locks out competition for such demand and consequently harms both competition and innovation."[3] This is an economic theory of competitive harm resulting from "foreclosure."

14. Under standard economic models of exclusionary conduct and foreclosure, in order for there to be competitive harm at least two conditions must be met: (i) the challenged practice must attract sufficient volume that rivals are deterred from entering or expanding, *and* (ii) the entity that deterred entry/expansion, as a result, must be able to charge higher prices in

3. Order, ¶6.

areas where competition would otherwise occur.[4] Both of these elements – discouraging rivals' deployment of facilities and maintaining prices above competitive levels – must hold for there to be harm to competition. It is important to note, however, that these conditions by themselves are not sufficient for there to be competitive harm. Even if both conditions hold, pro-competitive effects may outweigh any anticompetitive effects.[5] As we describe later, the economic literature recognizes that there are only limited circumstances in which foreclosure can actually lead to harm to competition.

15. In analyzing available evidence and evaluating whether a business practice meets this test of anticompetitive foreclosure, it is critical to distinguish between foreclosure that results in harm to competition and ordinary and desirable competition. The fact that one firm (*e.g.*, an ILEC) provides a customer with a product or service necessarily means that another (*e.g.*, a CLEC) does not. But that is not anticompetitive foreclosure and instead is the standard result of market competition in which a firm's desire to win customers (and earn profits) provides the incentive for it to lower price, improve service and innovate. If one were to infer competitive harm every time a larger competitor wins a contract from a smaller competitor, one would be forced to conclude that price competition is anti-competitive. Antitrust is designed not to protect competitors, but competition.

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4. Reply Declaration of Dennis W. Carlton and Allan L. Shampine, WC Docket No. 05-25, March 12, 2013 (Carlton & Shampine Reply Declaration), ¶7. See also Dennis Carlton and Michael Waldman, "The strategic use of tying to preserve and create market power in evolving industries," RAND Journal of Economics, vol. 33, 2002; Randal Heeb, "A framework for the economic analysis of exclusionary conduct," June 23, 2014, FTC/DOJ Workshop on Conditional Pricing Practices, p. 6 ("Four necessary conditions to have anticompetitive effects: Diminished ability of rival to compete; Enhanced market power of monopolist; Harm to consumers; Negative contracting externality."); Fiona M. Scott Morton, "Effective Contract Prices," FTC/DOJ Workshop on Conditional Pricing Practices, pp. 2-3 (Noting partial exclusive dealing and tying require market power, and that "the contract has to impact competition if it is to be an antitrust violation."); as cited in Order, notes 53 and 54.
5. Carlton & Shampine Reply Declaration, ¶7.

16. In addition, the fact that a rival fails to win a contract and then chooses not to make the associated customer-specific investment does not mean that the winning service provider can charge an above-competitive price. Instead, the price that results from the competitive process is constrained by the presence of that rival and its ability to serve the customer both at present and in the future. With respect to special access services, the widespread scope of CLEC facilities today indicates CLECs can construct facilities where demand and competition warrant, and will be able to do so in the future. Moreover, ILEC pricing of special access services is tariffed and set on a state or region-wide basis. This means that competition from CLECs in areas where demand is most concentrated constrains prices in other areas as well.

B. THE RAPID DECLINE IN THE DEMAND FOR DS-1 SERVICES AND RELATED CHANGES IN THE ACCESS SERVICES MARKETPLACE ARE INCONSISTENT WITH CLAIMS ABOUT ANTICOMPETITIVE FORECLOSURE

17. Complainants' theories of competitive harm from foreclosure are contradicted by marketplace realities.[6]

18. The Commission recognizes that the access services market includes both TDM-based as well as non-TDM based business data services such as Ethernet.[7] Based on 2013 data, the Commission estimates that revenues from these traditional TDM services "continue to make up in the range of sixty percent of the roughly $40 billion annual special access market" with around forty percent consisting of untariffed services including Ethernet and other optical

6. The FCC's 2013 data collection is expected to provide more detailed information about competitive alternatives. These data also may allow additional analysis of the relationship between portability options, term commitments and volume commitments and CLEC growth. However, AT&T explained in its motion for an extension of time, it will take substantial additional time for AT&T to complete its initial analysis of these data. Although the ILECs requested a minimum of sixty days to properly review the data, the Bureau only very recently made this detailed data available for use in this proceeding and provided only three weeks to analyze the data. We are continuing to analyze those data and reserve the opportunity to present a more thorough analysis in our rebuttal.

7. Order, ¶2.

services.[8] As the Commission notes, this "investigation concerns only a subset of specialized telecommunications services that continue to operate under tariffs" and does not concern "optical or packet-based business data services like Ethernet."[9]

19. Because the access services market defined by the Commission includes more than just TDM-based services, Complainants' claims should be viewed in the context of all of these different types of special access services and account for important trends in the marketplace. Most fundamentally, the demand for TDM DS-1 services has declined rapidly in recent years while the demand for Ethernet, a non-TDM service, has grown rapidly. Between January 2013 and October 2015, AT&T sales of TDM DS-1 services to non-affiliates fell more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**, as the industry continues to migrate away from TDM-based services to Ethernet.[10] Since the end of 2013, AT&T's TDM DS-1 revenue from non-affiliates have fallen by about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]**[11] It is difficult to reconcile claims that DS-1 customers are "locked in," giving rise to foreclosure concerns, with this sharp decline in DS-1 sales. The Commission's Order largely omits discussion of the fact that TDM-DS1 services are undergoing a rapid decline and fails to consider how that fact affects foreclosure concerns.

20. At the same time, sales of Ethernet services are rapidly increasing. A leading industry analyst reports that "U.S. Ethernet port growth was unprecedented in the first half of 2015 and easily surpassed previous estimates. … [T]here are few indications of the typical slowing growth patterns that we look for when services reach this size and maturity. Primary

8. Order, ¶2.
9. Order, ¶2 and Appendix "Incumbent LEC Tariff Pricing Plans Subject to Investigation," p. 56.
10. Declaration of Paul Reid.
11. Declaration of Paul Reid.

drivers for growth are massive migration from TDM to Ethernet services."[12] Ethernet services are untariffed and are provided by CLECs as well as ILECs, with ILECs accounting for only three of the eight largest providers. Level 3, a leading CLEC, is the second largest provider of Ethernet services in the U.S.[13] That is, CLECs are deploying facilities and offering special access services primarily through newer technologies such as Ethernet that compete with the declining TDM DS-1 services. The rapid changes in the special access marketplace are further reflected in the fact that CLECs now provide a substantial share of traditional TDM services. Specifically, the Commission estimates that, as of 2013, roughly one-third of the demand for traditional TDM services was being served by firms other than ILECs. [14]

21. Even the already-outdated 2013 data relied upon by the Commission, together with information from AT&T, indicate that DS-1 sales under AT&T's portability option account for only about 10 percent or less of all sales in the special access marketplace. First, the Commission estimates that TDM services account for only 60 percent of special access revenues, with the rest accounted for by Ethernet and OC-n services.[15] Second, the Commission estimates that CLECs account for about 33 percent of TDM services.[16] Third, AT&T estimates that roughly **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY CONFIDENTIAL]** percent of its TDM sales are for DS-1 circuits, the only service that is covered by AT&T's portability option.[17] Fourth, AT&T estimates that only about **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY CONFIDENTIAL]** of its aggregate DS-1 sales are

12. Vertical Systems Group, "Ethernet Market Share – U.S.: Mid-2015 U.S. Port Share," August 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/ .
13. *Id.*
14. Order, ¶3.
15. Order, ¶2.
16. Order, ¶3.
17. Approximation based on AT&T non-affiliate sales data.

covered by the portability option.[18] Together, these data indicate that AT&T's DS-1 covered by portability account for only about 10 percent of the special access marketplace, as defined by the Commission. The rapid and on-going decline in TDM DS-1 services since the end of 2013 suggests that this share may be overstated already, and will continue to decline in the future. As noted, for example, AT&T's TDM DS-1 revenues have declined by about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** since the end of 2013.

C. MANY AT&T SPECIAL ACCESS CUSTOMERS CHOOSE NOT TO TAKE THE PORTABILITY OPTION AND MUCH DS-1 DEMAND REMAINS AVAILABLE TO CLECS

22. The economic theories of competitive harm from foreclosure invoked by Complainants requires that circuit portability – the contract element being offered by AT&T in exchange for the volume commitment – be sufficiently important that enough special access customers will accept the volume commitment for a sufficiently large portion of available demand that CLECs are either driven out of business or are deterred from having a substantial competitive presence. *This requirement is not met.* In fact, many customers do not choose to take the portability option – special access customers have many contractual options when purchasing AT&T's TDM DS-1 service, and substantial demand for special access services can be diverted to AT&T's rivals without regard to AT&T's tariffs that are the focus of attention in this proceeding.

23. Complainants assert that "most, if not all" CLECs purchase services subject to the portability/volume commitment option.[19] The rapid decline in AT&T's TDM DS-1 sales documented above demonstrates that, as a general matter, special access customers are not "locked in" by portability/volume commitments. This section shows that these claims are also

18. Declaration of Paul Reid.
19. Order, ¶34.

incorrect even among the more limited set of special access customers that do purchase TDM DS-1 services.

24. Preliminarily, it is important to recognize that the AT&T tariffed pricing plans under investigation in this proceeding – one applicable in each of the four regions within AT&T's ILEC footprint – are only one of multiple options available to customers in those regions.[20] In each region, customers can purchase services under month-to-month plans or under pure term plans. The tariff pricing plans under investigation are a third option. They provide customers who choose term plans with "portability," which means that they can disconnect a certain amount of the services purchased under term plans prior to the expiration of the term without incurring early termination penalties. No additional discounts are offered under the -portability plans.

25. Arguments that the plans are "crucial" thus cannot turn on the notion that a subscription to these plans is required to obtain the maximum available discounts from monthly rates. Instead, they must turn on arguments that the "portability feature" – the ability to terminate term plans early without incurring early termination liability – is necessary. But the data refute any such claims.

26. The non-essential nature of the portability/volume commitment option is confirmed by the fact that **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY**

20. As detailed in the accompanying Declaration of Paul Reid, the Commission is investigating three groups of tariffs for special access services from AT&T – the Discount Commitment Plan (DCP) in the Ameritech region; the Area Commitment Plan (ACP) in the BellSouth region; and the Term Payment Plans (TPP) in the Pacific Bell and Southwestern Bell regions.

CONFIDENTIAL] percent of AT&T's DS-1 circuit revenue from non-affiliates was not purchased under the portability plans subject to this investigation.[21,22]

27. Moreover, many AT&T customers prefer the flexibility of other types of arrangements.[23] For example, AT&T provides hundreds of thousands of DS-1 UNE loops to CLECs that choose those loops rather than tariffed special access services.[24] Further, in 2014, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of AT&T's DS-1 channel termination revenues were purchased under month-to-month contracts.[25]

28. Non-use or non-renewal of portability contracts by large customers also demonstrates that these provisions are not "crucial." For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** does not purchase under any of the portability plans, and **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** does not use the portability option in the Ameritech region.[26]

21. Based on AT&T data for former Ameritech, Southwestern Bell and Pacific Bell territories. Similar data are not available for the former BellSouth region. Overall (including AT&T affiliates), for all four regions the portion of DS-1 services purchased under the four tariff pricing plans under investigation account for about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's total DS-1 sales. For further discussion, see Declaration of Paul Reid.
22. Data for 2014 show that a large portion of customers that purchased services under term plans for longer periods often forgo the portability option. For example, only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of all revenue from channel terminations (including affiliated and unaffiliated customers) under five-year term plans in the Ameritech region was purchased under the portability option.
23. Our prior declaration also showed that many non-affiliated AT&T customers also purchased on a month-to-month basis. Carlton & Shampine Reply Declaration, ¶17.
24. Declaration of Paul Reid.
25. Based on AT&T sales data for 2014.
26. Declaration of Paul Reid.

D. A LARGE PORTION OF AVAILABLE DEMAND CAN BE DIVERTED TO ENTRANTS WITHOUT RESULTING IN EARLY TERMINATION LIABILITIES

29. The substantial volume of customers that do not take the portability/volume commitment option leaves a large volume of AT&T TDM DS-1 circuits not subject to early termination or shortfall liabilities and readily available to AT&T's rivals. This section documents the amount of demand from AT&T's non-affiliated customers that can readily be available to AT&T's rivals as the result of (i) volume rolling off of longer-term contracts that is not subject to portability commitments; (ii) volume purchased under month-to-month contracts; and (iii) volume available as the result of headroom under portability contracts that is available to be transferred to rivals without penalties.

30. While large investments by CLECs in recent years indicate that they have achieved an economically efficient scale of operations, the volume of DS-1 circuits currently served by AT&T that is not covered by portability agreements is large enough to enable CLECs to greatly expand their DS-1 sales relative to their current scale or to serve that demand using newer technologies than TDM.

a. A substantial portion of sales volume not covered by portability and related volume commitments becomes available to CLECs each year.

31. As discussed above, many of AT&T's DS-1 customers do not take the portability option and purchase services under contracts that are not under investigation here. While many of those sales are subject to term contracts, in any given year substantial volumes of circuits not subject to portability related volume commitments "roll off" long term contracts, making them available for diversion without penalty. In addition, a substantial volume of circuits are purchased on a month-to-month basis and are not subject to any early termination liabilities.

32. Table 1 presents an estimate of the volume of DS-1 sales available to CLECs each year without constraint from either portability or term commitments, either from customers that purchase on a month-to-month basis or from customer volume that rolls off of term agreements.[27]

33. As the table shows, roughly a quarter of AT&T's sales were available to be diverted to CLECs in any given year without constraint from either any portability commitment or term commitment.[28] Put another way, nearly all of AT&T's demand becomes available to CLECs every four years. That volume is roughly 30 percent of CLECs' estimated annual DS-1 sales, and thus represents the opportunity for a substantial increase in CLEC sales – indeed, CLECs could nearly double their aggregate sales in three to four years, solely by winning the unencumbered AT&T demand that comes available. It is important to note that this fraction is relative to *total* CLEC DS-1 sales. The opportunity for any individual CLEC relative to its current volume, by definition, would be substantially greater.

27. The analysis is based on AT&T's sales to non-affiliated customers in the Ameritech, BellSouth, Pacific Bell and Southwestern Bell regions.

28. Contracts subject to portability options turn over every few years. Below, we assume that the average term of a portability requirement is 3 years which implies that roughly one-third of the covered circuits will "roll off" these contracts each year, on average. (TPP contracts are for 3-year terms; DCP contracts are for 3 or 5 year terms; and the ACP offers terms from 2 to 5 years.)

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34. As Table 1 shows, even if one assumes that all volumes covered by an AT&T portability option volume commitment are "locked up," that amount is still only 34 percent of the

sum of DS-1 sales by AT&T to non-affiliates and sales by CLECs. When non-TDM services such as Ethernet are considered, the volume "locked up" due to AT&T volume subject to portability plans is only about 20 percent of industry special access volume available to CLECs (again excluding AT&T DS-1 sales to its own affiliates). Furthermore, the rapid growth of Ethernet services implies that this 20 percent figure is declining and thus overstates the importance of AT&T's portability option going forward. As discussed above, the potential "locked up" volume is even smaller – less than 10 percent of revenue in the special access marketplace as defined by the Commission. In sum, the limited industry-wide role of AT&T's portability option and related volume commitments highlights the implausibility the AT&T's tariffs at issue harm competition by foreclosing the ability of CLECs to compete.

b. A Significant Portion of TDM DS-1 Services Purchased Under Portability Plans Is Divertable to Competitors With No Early Termination or Shortfall Liability.

35. The available divertible demand is actually higher than indicated above. AT&T's portability/volume commitment options eliminate early termination liabilities for all circuits covered by the contract and impose penalties only if volume falls from the initial committed level. Under the TPP, penalties apply only when volume falls by 20 percent relative to the initial committed level, and the comparable percentage is 10 percent under DCP. Thus, new TPP and DCP contracts include substantial "headroom" that enables customers to drop circuits, or transfer them to a rival provider, without penalty.[29]

36. Many customers under AT&T's TPP and DCP plans have headroom, and we observe that these customers are typically not close to the "zero headroom" level at which

29. Under the ACP, the customer selects the volume commitment, so there is no required relationship to total purchases. ACP customers, in effect, choose their preferred level of "headroom" in selecting their own commitment level.

penalties would apply. That is, there is a substantial amount of special access services that could be diverted to competitors without penalty under existing portability volume commitments.

37. For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** purchases in 2012-14 were 20 percent above the level at which penalties would be assessed in the AT&T's Southwestern Bell territory and fully 37 percent above the penalty-level in AT&T's Pacific Bell region. In the same period, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** purchases were 20-32 percent above the penalty level across AT&T region and **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** purchases were from 29-39 percent of the penalty level across AT&T regions.[30] For AT&T's affiliated and non-affiliated portability customers taken as a whole, purchases were from 16-27 percent above penalty levels in 2012 across AT&T regions, and from 11-16 percent above penalty levels in 2014 across regions.[31]

38. In summary, customers accounting for a large amount of AT&T's DS-1 sales are available to CLECs either because they (i) roll off of longer-term contracts not subject to portability commitments; (ii) are purchased under month-to-month contracts; or (iii) have available headroom under existing portability contracts and so can transfer circuits to rivals without penalties. These data thus confirm that the portability plans under investigation in this proceeding do not foreclose CLECs from winning each year a large portion of the current demand for TDM-based services provided by AT&T, and winning nearly all of it every three or four years.

30. Declaration of Paul Reid.
31. Declaration of Paul Reid.

E. THE WIDESPREAD DEPLOYMENT AND EXPANSION OF CLEC FIBER NETWORKS IS INCONSISTENT WITH FORECLOSURE CLAIMS

39. Concerns that the AT&T tariffs harm competition are based on the view that these contracts make it unprofitable for CLECs to enter or to expand their networks. As noted above, Complainants claim that the AT&T tariffs under investigation have "locked up" sufficient demand to limit the competitive presence of rivals.[32] This concern is contradicted by the widespread deployment and growth in CLEC fiber networks and access services provided by CLECs in recent years.

40. The AT&T tariffs at issue were introduced in 1993 and 2003.[33] Since that time, CLECs have deployed widespread fiber networks throughout the United States. By design, these networks are intended to maximize proximity to large numbers of customers and facilitate the ability of CLECs and their customers to provide retail services to end users in nearby buildings. In 2005 and 2007, AT&T provided the Commission with mapping data for fifteen MSAs showing that competitors had deployed facilities capable of serving the majority of AT&T's demand for special access services.[34] In 2010, Carlton and Sider provided further evidence significant on-going entry and investment in special access services.[35] For example, a 2010 report by US Telecom noted that there was an average of six known fiber-based providers within each of the top 50 MSAs.[36]

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32. Even if, contrary to available evidence, substantial entry and expansion of AT&T's rivals were not observed, this would not necessarily suggest that CLECs had been foreclosed and that competition had been harmed. Instead, as discussed above, CLECs may constrain AT&T pricing by providing a competitive alternative even if AT&T continues to win special access customers. Similarly, even if there were, contrary to available evidence, an absence of substantial entry and expansion by CLECs, that could result from the fact that customers were already purchasing substantial volumes from other non-ILEC providers.
33. Declaration of Paul Reid.
34. Declaration of Paul Reid.
35. Declaration of Dennis W. Carlton and Hal S. Sider, WC Docket No. 05-25, January 19, 2010, §III.E.1.
36. *Id.*, ¶48.

41. AT&T also has some insight into competitive alternatives based on its own purchases out of region. For example, in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** AT&T has competitive alternatives for more than 80 percent of the special access circuits it purchases, and in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** it has competitive alternatives for nearly 90 percent of its circuits. According to responses AT&T has received for its requests for proposals on its cell sites in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** territory, competitive alternatives are available for nearly 80 percent of those sites.[37] As noted above, for TDM DS-1 special access services, which are the focus of this investigation, the FCC acknowledges that firms other than CLECs already provide about a third of total TDM demand.[38]

42. Moreover, the growth of non-TDM services offered by CLECs also is inconsistent with claims of anticompetitive foreclosure. As noted above, the Commission reports that the preliminary results of the special access data collection show about 40 percent of special access demand is provided by Ethernet or other services that compete directly with AT&T-provided TDM special access services.[39] While Complainants assert that AT&T's terms and conditions prevent or slow this migration, the rapid growth of Ethernet services is rapidly displacing traditional TDM DS-1 special access services for a broad range of customers. As discussed above, Vertical Systems Group, reports that "U.S. Ethernet port growth was unprecedented in the first half of 2015 and easily surpassed estimates. […] [T]here are few indications of the typical

37. Declaration of Parley Casto.
38. Order, ¶3.
39. Order, ¶2.

slowing growth patterns that we look for when services reach this size and maturity. Primary drivers for growth drivers are massive migration from TDM to Ethernet services."[40]

43. Other research firms report similar trends. For example, "[t]he migration from legacy private-line services to Ethernet transport will accelerate. ATLANTIC-ACM estimates that revenue from legacy private-line services bought by businesses was down 8% from 2013 to 2014, while Ethernet transport … revenue reached $4B in 2014, up 16% from 2013. Ethernet's share will grow from 38% of private transport in 2013 to 66% in 2019 as every sales conversation now starts with Ethernet."[41]

44. The large scale deployment of non-ILEC based Ethernet providers enables cable companies and other providers to minimize their reliance on ILECs out of their regions when constructing Ethernet-based private networks. For example, in September 2015, Comcast announced it had "struck wholesale agreements with cable operators including Cox Communications Inc., Time Warner Cable Inc., Charter Communications Inc., Cablevision Systems Corp. and Mediacom Communications Corp. to offer services using their pipes." This allows it "to offer data services to Fortune 1000 business across the country, including those located in other cable companies' territories."[42]

45. The extent of the fiber network deployment, ongoing efforts to connect buildings to those networks (sometimes through fiber, sometimes through wireless connections), and on-going efforts to expand Ethernet services are reflected in the following examples:

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40. Vertical Systems Group, "Ethernet Market Share – U.S.: Mid-2015 U.S. Port Share," August 24, 2015, http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/ .

41. Charlie Reed, "Top Business Telecom Networking Trends in 2015," Telecom Ramblings, February 12, 2015, http://www.telecomramblings.com/2015/02/top-business-telecom-networking-trends-2015/.

42. Shalini Ramachandran, "Comcast to Sell Data Services to Big Firms Nationwide," Wall Street Journal, September 16, 2015, http://www.wsj.com/articles/comcast-to-sell-data-services-to-big-firms-nationwide-1442376240.

- "Comcast is doing an all-out assault on the last mile, bypassing traditional Tier 1 last mile carriers…"[43]
- "Today, TWCBC [Time Warner Cable Business Class] has a 150,000-fiber-route-mile network infrastructure that currently serves 31 major metro markets nationwide with more than 80,000 fiber-lit buildings… This network will be complemented with last mile access from over 25 alternate access service providers through 130 External Network-to-Network Interface (ENNI) locations already in place."[44] Time Warner added nearly 32,000 commercial buildings to its network in the first half of 2015.[45]
- XO claims that it can reach more than half of all U.S. businesses in the 40 major metropolitan markets it serves.[46] Since 2014, XO has connected buildings across 25 regional markets and 11 other cities and regions, and has announced plans to continue to connect more buildings close to its fiber and Ethernet network.[47]
- Level 3 has stated that there are over 100,000 enterprise buildings within 500 feet of its U.S. network.[48] "Sunit Patel, chief financial officer of Level 3, said it could cost between roughly $50,000 to $150,000 to connect a large client, with the

43. "Yottabyte Era of 2019: Verizon, Comcast and Arris Play Disruptor of the Last Mile," Bizety, September 10, 2015, https://www.bizety.com/2015/09/10/yottabyte-era-of-2019-verizon-comcast-and-arris-play-disruptor-of-the-last-mile/.
44. Time Warner Cable press release, "Time Warner Cable Business Class Announces Major Enhancements to its Ethernet Services Portfolio," September 2014, https://business.timewarnercable.com/resource-center/news/twcbc-announces-major-enhancements-to-its-ethernet-services-portfolio html.
45. Time Warner Cable, Second-Quarter 2015 Earnings Summary, July 30, 2015, p. 10, http://ir.timewarnercable.com/files/2015/2Q15/Earnings-Summary-Presentation-2Q15-FINAL.pdf.
46. http://www.xo.com/solutions/business/wholesale, and http://www.xo.com/why/the-right-network/reach/.
47. Sean Buckley, "XO Takes Success-Based Approach to On-Net Fiber Buildouts," FierceTelecom, September 3, 2015, http://www fiercetelecom.com/story/xo-takes-success-based-approach-net-fiber-buildouts/2015-09-03.
48. Level 3 Communications, 2011 Annual Meeting of Stockholders Presentation, May 19, 2011, p. 3, http://files.shareholder.com/downloads/LVLT/2168870475x0x469486/f0c304e5-b9ea-4c17-a9b6-bd3a8088c521/Level%203%20Communications%20Annual%20Meeting_May%202011_FINAL.pdf.

investment paid off quickly – within six months to two years, depending on the length of the contract."[49]

- "Lightpath, the dedicated business services arm of Cablevision Systems Corp., announced Wednesday that it has now lit up 7,000 commercial locations in the greater New York metro region. That represents a jump of more than 1,000 buildings in the past year."[50]
- "As [Consolidated Communications] builds out to towers, it will also look for opportunities to extend the fiber to a mix of other carrier customers, local schools, and businesses along that path. Fiber expansion overall continues to be a key theme for Consolidated. In the third quarter, it added 880 new fiber route network miles and 231 new on-net fiber enabled buildings. ... 'The way we're designing that as we build the network is to pass MDUs for triple play customers, pass business parks so we're not building a straight line from A to B, but we're making the best investment for additional growth.' Udell added that 'once the fiber is there the incremental costs to add small cells become a lot more reasonable.'"[51]
- Zayo operates a fiber network in over 300 metro markets, provides backhaul services to 4,500 cellular towers as of 2014, and announced that it was "actively constructing fiber to an additional 1,200."[52]

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49. Liana Baker, "One of the Industries Crushed by the Dotcom Crash is Making a Bit Comeback," Business Insider, June 25, 2014, http://www.businessinsider.com/r-business-bandwidth-demand-lights-up-once-dark-fiber-sector-2014-25.
50. Alan Breznick, "Lightpath Fiber Lights 7,000 NY Buildings," LightReading, April 17, 2014, http://www.lightreading.com/cable-video/cable-business-services/lightpath-fiber-lights-7000-ny-buildings/d/d-id/708692.
51. Sean Buckley, "Consolidated sees growing momentum in small cell backhaul," FierceTelecom, November 12, 2015, ttp://www fiercetelecom.com/story/consolidated-sees-growing-momentum-small-cell-backhaul/2015-11-12.
52. Zayo Group Press Release, "Zayo to Significantly Expand Fiber-to-the-Tower Footprint in Nashville," July 22, 2015, http://investors.zayo.com/news/2015/07-22-2015-130304146.aspx, and Zayo Group Holdings,

- Windstream expanded its network to offer fixed wireless services in 12 new markets in 2015, with plans to expand to seven additional markets by the end of 2015, for a total of 44 markets.[53]
- "Exalt Wireless, the leading innovator of next-generation wireless connectivity systems for private networks and Internet infrastructures, today announced that East Kentucky Network (EKN) has deployed Exalt ExploreAir microwave systems to backhaul cellular traffic in its LTE network. … EKN had used T1 lines to backhaul 3G wireless traffic from its more than 230 cell sites…"[54]

46. The presence of multiple fiber-based networks in a large number of metropolitan areas highlights that the portability options in AT&T's tariffed pricing plans have not foreclosed entry and expansion by CLECS. Because these rivals are located in many areas, and provide direct building connections, they provide a constraint on the ability of ILECs to exercise market power. Moreover, the absence of a direct CLEC connection to a building does not necessarily imply the absence of competition since the ability to provide such a connection is itself a constraint on market power. As discussed above, the absence of a direct CLEC connection to any particular building (or set of buildings) does not necessarily imply the absence of competition since the ability to provide such connections itself is a constraint on market power.

Inc. Form 424(B)(4) Prospectus, March 13, 2015, pp. 45-46, http://www.sec.gov/Archives/edgar/data/1608249/000119312515090531/d877708d424b4 htm.

53. Windstream Press Release, "Windstream and Infinera Partnership Drives Windstream Carrier Solutions' Leadership in the Wave Transport Market," August 12, 2015, http://news.windstream.com/article_display.cfm?article_id=1659.

54. Exalt Wireless press release, "East Kentucky Network Deploys Exalt for LTE Backhaul," October 27, 2015, http://www marketwired.com/press-release/east-kentucky-network-deploys-exalt-for-lte-backhaul-2067357.htm.

F. THE TERMS AND CONDITIONS OF THE AT&T TARIFFS UNDER INVESTIGATION LACK EFFECTIVE MECHANISMS FOR FORECLOSURE

47. The terms and conditions of the AT&T tariffs at issue allow customers wide flexibility with respect to establishing and meeting contractual obligations. These factors enable customers to exercise considerable latitude in obtaining DS-1 and other access services from AT&T and CLECs and thus highlight the implausibility of foreclosure concerns.

1. Foreclosure claims are inconsistent with the ability of customers to purchase DS-1 services from AT&T through a variety of contractual mechanism.

48. In evaluating foreclosure concerns raised by Complainants, as noted above, it is important to recognize the wide variety of contractual mechanisms available for purchasing TDM-based DS-1 services that are not under scrutiny in this investigation. As shown above, AT&T special access customers frequently obtain services under AT&T tariffs not at issue here that permit discounts based on term length with no portability/volume commitments. Customers also often have the ability to negotiate non-tariffed contracts, and also can obtain access services through unbundled network elements (UNEs) sold under TELRIC-based rates.[55] Special access customers, including **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** and others, collectively purchase hundreds of thousands of DS-1 UNE loops from AT&T.[56]

2. Foreclosure claims are inconsistent with the ability of customers to avoid penalties for terminating significant volumes of circuits under the tariffs at issue.

49. The terms and conditions of the AT&T tariffs under investigation eliminate early termination liabilities faced by many customers for a substantial portion of their demand.

55. Carlton & Shampine Reply Declaration, ¶14.
56. Declaration of Paul Reid.

Customers can "churn" – *i.e.*, disconnect a circuit and replace it with a different one – as often as they like, as long as they maintain the agreed upon commitment level. In addition, the portability option allows customers to disconnect without replacement up to 20 percent of volume under the DS-1 TPP (10 percent under the DCP), without incurring early termination or shortfall liabilities. The portability options thus create a substantial amount of volume that is *less* restricted from moving to competitors than would be a volume commitment or term commitment alone. Moreover, the ACP plan available in BellSouth's region enables customers to exempt from portability-related liabilities any volume of business that it so desires. As a result, customers with circuits at the end of their term commitment that wish to switch to a CLEC can do so simply by lowering the volume commitment selected under ACP.

3. Foreclosure claims are inconsistent with customers' ability to sponsor entry by concentrating termination of circuits not subject to penalties in a single geographic area.

50. Under the tariffs at issue, special access customers can make substantial reductions in their purchases without triggering penalties, which means that all of that diverted volume can be concentrated in specific geographic areas (*e.g.*, in a particular MSA). The volume commitments are made over large geographic areas (either states or regions). This makes the portability options particularly unsuitable for locking up local demand.

51. Specifically, a large customer that takes the portability option can dedicate *all* of its headroom across all of AT&T's region to sponsoring entry in any geographic locale in that region it wishes. Thus, if special access customers wanted to sponsor entry but were constrained (at least to some degree) from doing so everywhere by the volume commitments, they could do so on their current contract by concentrating available demand in just a few areas. The ability of

customers to do so under the AT&T tariffs is inconsistent with Complainants' claim that that the portability/volume commitment option is intended to foreclose competition.

52. Moreover, special access customers that take the portability/volume commitment option can also ratchet down their purchases over time (*e.g.*, in the Pacific Bell or Southwestern Bell territories a firm can reduce its purchases to 80 percent of its initial committed volume without penalty, and after three years, can renew based on the reduced amount, and further reduce its volume, and so on). If special access customers wanted to sponsor entry but were constrained by the volume commitments, we would expect to see this "ratcheting" effect, with customers consistently reducing their volumes over time to the 80 percent threshold, again focusing that volume on particular geographic areas to sponsor entry. In fact, we do not observe CLECs systematically reducing the share of AT&T DS-1 circuits covered under portability commitments, as would be expected if customers wished to sponsor entry or otherwise obtain services from CLECs.

4. Foreclosure claims are inconsistent with the wide latitude available to customers in picking the length of term commitments under AT&T tariffs.

53. Complainants suggest that portability is crucial to special access customers because special access customers, when providing retail services that use AT&T special access services, cannot match retail term commitments with those available under AT&T's special access tariffs.[57] However, this claim fails to account for the wide latitude that AT&T customers have in picking the length of term commitments under AT&T tariffs. Specifically, AT&T's tariffs provide customers with a wide range of term commitments – 1, 2, 3, 4, or 5 years in the former Ameritech region; 1, 2, 3, 5 or 7 years in the former PacTel and Southwestern Bell

57. Order, ¶96 ("Competitive LECs contend that competitive pressure in the retail market precludes retail contracts of equal length to those in incumbent LECs' pricing plans they must purchase under to obtain an input price that will allow a competitive retail price.")

regions, or any numbers of months between 24 and 72 in the former BellSouth region.[58] It would be surprising if AT&T's special access customers' own terms of service did not at least roughly coincide with at least one of the available options, and if this is so there is no support for the assertion that portability is essential in order to avoid a mismatch in the timing of special access and retail contracts that might result in foreclosure.

5. CLECs' use of contractual terms that are similar to AT&T's indicates that these terms serve a legitimate business rationale

54. It is well recognized that long-term contracts, as well as contracts that – unlike the AT&T tariffs under investigation – require some degree of exclusivity between customers and suppliers can serve legitimate business interests and promote competition. For example, as we discuss in more detail later in this declaration, the articles cited by the Commission as the theoretical basis of their concern that the AT&T tariffs result in anticompetitive foreclosure recognize that contract terms of these types can be procompetitive.[59]

55. As described in the accompanying declaration from Parley Casto, CLEC contracts for special access services include terms and conditions that are similar to those incorporated in AT&T tariffs, including CLEC contracts that include a type of portability. The fact that AT&T competitors, which the Commission would presumably acknowledge lack market power, use similar terms and conditions as those being challenged here indicates that such terms are not anticompetitive.

56. In sum, the available data about the special access marketplace provide no basis for concern that the AT&T tariffs under investigation harm competition by deterring the entry

58. Declaration of Paul Reid.

59. See, for example, Eric Rasmusen, J. Mark Ramseyer and John Shepard Wiley, Jr., "Naked Exclusion: Reply," American Economic Review, 2000, vol. 90, p. 310 ("[E]xclusive dealing 'often' serves legitimate business purposes.").

and expansion of CLECs. To the contrary, available data indicate that CLECs are succeeding in attracting a large volume of AT&T DS-1 customers, and that a substantial volume of AT&T's DS-1 business faces no early termination liabilities and so can be readily diverted to CLECs should CLECs find it in their interest to compete. Moreover, the terms and conditions of AT&T's tariffs lack effective mechanisms for foreclosure. Under these circumstances, AT&T's tariffs are best understood as another contracting option that can help attract certain DS-1 customers, not a mechanism for harming competition by foreclosing the ability of rivals to enter and expand their networks.

III. THE ECONOMIC LITERATURE CITED BY THE COMMISSION DOES NOT SUPPORT CONCERNS THAT THE AT&T TARIFFS HARM COMPETITION

57. The Commission's concerns that the AT&T tariffs at issue harm competition by foreclosing CLECs are based in part on economic literature that identifies circumstances in which contracting practices can harm competition by foreclosing rivals. The Order highlights eight papers, including one by one of the authors of this Declaration, which present theoretical economic models that identify circumstances in which business practices such as exclusive dealing, bundling/tying, market share discounts, and loyalty discounts can potentially harm competition by foreclosing rivals.[60] Such practices are sometimes referred to as "vertical arrangements" and we use this shorthand below.[61]

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60. Order, note 54, citing (1) Philippe Aghion and Patrick Bolton, "Contracts as a Barrier to Entry," The American Economic Review, June 1987; (2) Dennis Carlton and Michael Waldman, "The strategic use of tying to preserve and create market power in evolving industries," RAND Journal of Economics, Summer 2002; (3) Ilya Segal and Michael Whinston, "Naked Exclusion: Comment," The American Economic Review, March 2000; (4) Eric Rasmusen, J. Ramseyer and John Wilsey, Jr., "Naked Exclusion: Reply," The American Economic Review, March 2000; (5) John Simpson and Abraham Wickelgren, "Naked Exclusion, Efficient Breach, and Downstream Competition," The American Economic Review, September 2007; (6) Fiona Scott Morton, "Contracts That Reference Rivals," 27 Antitrust 3, Summer 2013; (7) Einer Elhauge and Abraham Wickelgren, "Robust Exclusion and Market Division Through Loyalty Discounts," Working Paper, April 2014; and (8) Mara Lederman, "Are Frequent-Flyer Programs a Cause of the 'Hub Premium'?," Journal of Economics and Management Strategy, Spring 2008.

61. Scott Morton 2013, p. 72.

58. All of the economic literature cited by the Commission in support of its competitive concerns has a common theme, and brings us back to the results of the analysis discussed above – all of these models require that a sufficiently large amount of demand be locked up thereby leaving insufficient demand for rivals with the result that there is a harm to competition. The evidence presented above shows that is not the case here. AT&T's TDM DS-1 sales have declined sharply, there is a great deal of volume that is not "locked up," rival entry has already occurred and is continuing to occur.

59. These empirical facts alone demonstrate that the theoretical models cited by the Commission are not applicable and that AT&T's contracting practices do not fit the essential theoretical conditions identified in the cited literature that can result in anticompetitive foreclosure.

60. However, given the Commission's apparent interest in the theoretical analysis presented in these papers, we review aspects of them below. The review shows that the circumstances leading to competitive harm identified in many of the papers clearly do not apply to analysis of the AT&T's special access tariffs. We further highlight how these papers cited by the Commission recognize that business practices analyzed in these papers, including exclusive dealing, bundling/tying, market share discounts, and loyalty discounts, typically have an efficiency rationale and would be likely to result in harm to competition only under limited circumstances that do not apply here.

A. THE PAPERS CITED BY THE COMMISSION RECOGNIZE THAT PRACTICES SUCH AS EXCLUSIVE DEALING AND CONDITIONAL PRICING OFTEN SERVE LEGITIMATE BUSINESS PURPOSES

61. Before reviewing the models cited by the Commission in more detail, it is important to note that the papers cited by the Commission generally recognize that contracting

practices such as exclusive dealing and conditional pricing (*e.g.*, "loyalty discounts") are often motivated by efficiency considerations, and should not necessarily be thought to reflect anticompetitive motives. Moreover, the authors of the cited papers note that even if contracts have an effect on entry, it does not follow that there is harm to competition.[62] For example:

- Rasmusen, Ramseyer and Wiley, Jr. note that "normally a firm cannot use contracts with its customers or suppliers inefficiently to exclude a rival from competition, because the high price of these contracts will make this strategy unprofitable. …"[63]
- The same authors further note that anticompetitive "naked exclusion – if it ever really occurs – cannot be the only explanation for exclusive dealing. Rather, exclusive dealing 'often' serves legitimate business purposes."[64]
- Scott Morton notes that "[e]conomic theory and practical experience show that vertical arrangements among firms may facilitate the creation of new products, higher quality services, or lower-cost delivery channels."[65]
- Carlton and Waldman warn that "trying to turn the theoretical possibility for harm shown here into a prescriptive theory of antitrust enforcement is a difficult task. …

62. See, for example, Carlton and Waldman 2002, p. 213 ("That is, social welfare is increased by a prohibition on tying for some of the parameterizations in which the monopolist ties, but for other such parameterizations social welfare is decreased by a prohibition on tying."). See also Rasmusen, Ramseyer and Wiley, Jr. 2000, p. 310 ("[E]xclusive dealing 'often' serves legitimate business purposes."), Aghion and Bolton 1987, p. 399 ("The welfare conclusions obtained in this research [on exogenous switching costs] are radically different from ours. For example, in Klemperer, entry may be socially inefficient…"), and Carlton and Shampine 2013, ¶7 ("Even if the Commission concluded that some areas lacked reasonable alternatives, theory and empirical evidence both show that the terms and conditions at issue here can be pro-competitive. The pro-competitive benefits just discussed can apply regardless of the presence of competitive alternatives, and the 'loyalty contract' literature cited to by Complainants recognizes that such contracts can be efficient even when used by 'dominant' firms.").
63. Rasmusen, Ramseyer, and Wiley, Jr. 2000, p. 310.
64. Rasmusen, Ramseyer, and Wiley, Jr. 2000, p. 310.
65. Scott Morton 2013,

> [E]ven focusing solely on foreclosure can yield ambiguous results on how tying affects social welfare."[66]

62. Although not cited by the Commission, various commenters have stressed that, as a general matter, vertical restraints raise competition concerns under only limited circumstances. For example:

- In a presentation in the FTC/DOJ Workshop on Conditional Pricing Practices, Benjamin Klein notes that "[l]oyalty contracts, including contracts that include minimum distribution requirements in addition to sales share requirements, are commonly used as part of the normal competitive process when there is no possibility of exclusion."[67]
- In a discussion of quantity commitment discounts ("QCDs"), also referred to as "loyalty discounts," Kevin Murphy, Edward Snyder and Robert Topel conclude that:[68]

> First, QCDs virtually always have a clear pro-competitive rationale. Second, while economic theory shows that under certain conditions the intent and effect of commitment discounts could be to harm competition, these same theories provide little guidance in identifying situations where harm actually occurs. Further, few if any past cases provide convincing evidence of competitive harm, and no evidence of outright exclusion to our knowledge. In our view, the ubiquity of pro-competitive or competitively neutral reasons for QCDs, combined with the lack of reliable tests or filters that would identify anticompetitive conduct, support our overall conclusion that QCDs should be viewed as *presumptively legal*.[69]

66. Carlton and Waldman 2002, p. 215.
67. Benjamin Klein, "The Economics of Alternative Legal Standards for Loyalty Discounts," FTC/DOJ Workshop on Conditional Pricing Practices, June 23, 2014, p. 3
68. The authors define QCDs as "vertical agreements in which a seller conditions price discounts on the specified quantity or share of a product line." Kevin Murphy, Edward Snyder and Robert Topel, "Competitive Discounts and Antitrust Policy / Oxford Handbook Chapter," George J. Stigler Center for the Study of the Economy and the State, The University of Chicago, Working Paper No. 250, July 11, 2013, p. 1.
69. Murphy, Snyder and Topel 2013, p. 3, emphasis in original.

B. THE PAPERS CITED BY THE COMMISSION DO NOT FIT THE FACTS OF THE AT&T SPECIAL ACCESS TARIFFS AT ISSUE

63. The economic literature cited by the Commission analyzes the potential competitive impact of a range of business practices including (i) contracts that reference rivals, such as loyalty discounts and market share discounts; (ii) contracts in which a customer maintains an exclusive, or nearly exclusive, relationship with a supplier; and (iii) contracts that involve the strategic tying of monopoly and competitive products. We address each in turn.

1. Economic Literature Relating to Contracts that Reference Rivals

64. Several of the papers cited by the Commission analyze contracts that reference rivals ("CRRs").[70] Examples of CRRs include contracts in which discounts require the buyer to obtain a specified fraction of total purchases from the seller, including "market share" or "loyalty" discounts.[71]

65. Scott Morton provides a "quick test for assessing whether a contract is a CRR", which is asking whether the terms of the transaction "depend on information from a different buyer-seller relationship."[72] The AT&T tariffs under investigation clearly fail this test. The portability/volume commitment option in the AT&T tariff (for non-BellSouth areas) is based solely on a customer's sales at the time of the contract. In the BellSouth area, the commitment level is selected by the customer and is not conditional on the customer's historical purchases of DS-1 services or the customer's purchases from any other supplier.

66. Moreover, the fact that customers that take the portability/volume commitment option receive no discount relative to rates otherwise available on a circuit by circuit basis is not

70. Scott Morton 2013. Elhauge and Wickelgren 2014.
71. Elhauge and Wickelgren 2014, p. 1 ("In a loyalty discount contract, a seller commits to charge loyal buyers (those who buy all or a high percentage of the product from that seller) less than other buyers."). We also note that a limitation to their model that, in their words, "should be stressed", is that they assume there are no efficiencies to loyalty discounts, but, as they note, "[e]fficiencies could offset adverse effects." Elhauge and Wickelgren 2014, pp. 23-24.
72. Scott Morton 2013, p. 72.

consistent with the foreclosure strategies described by economic models that consider loyalty or market share discounts.

67. The Commission suggests that even if contracts do not reference rivals, the same potential anticompetitive effects may be achieved by offering a sufficiently high discount "that in effect locks up an equivalent amount of demand" to an exclusive or partially exclusive contract, potentially resulting in foreclosure that harms competition.[73] We discuss this further in the next section but we note here that our analysis above shows that the portability/volume commitment options do not generate "lock up" concerns due to the large amount of AT&T's DS-1 sales that are available to CLECs. Furthermore, as mentioned above, Scott Morton recognizes that CRR clauses are common and can have a variety of procompetitive benefits,[74] so there can be no presumption that if a CRR is observed, there must be, or is even likely to be, harm to competition.

2. Economic Literature Relating to Exclusive Contracts

68. Several of the papers cited by the Commission analyze exclusive, or partially exclusive, contracts in which the customer agrees not to purchase a product from other suppliers.[75] However, as the Commission recognizes, the AT&T tariffs at issue do not require that customers purchase exclusively from AT&T: "the tariffs under consideration *are not exclusive*. […] That is, there is no requirement that the purchaser meet all or even a particular fraction of its total need from the incumbent LEC. Indeed, in practice exclusivity is not observed."[76] Put simply, the AT&T tariffs at issue merely offer the option of portability with an

73. Order, note 54.
74. Scott Morton 2013, pp. 76-77, citing, for example, potential procompetitive benefits of encouraging the introduction of new products, reducing free riding, and allowing transaction prices to reflect current market prices where efficient investment depends on those prices.
75. Order, note 54, citing Aghion and Bolton 1987; Segal and Whinston 2000; Simpson and Wickelgren 2007; Rasmusen, Ramseyer and Wiley, Jr. 2000.
76. Order, note 54. Emphasis added.

associated volume commitment and do not depend on the level of the customer's purchases from other suppliers.

69. A customer that takes AT&T's portability option also agrees to a volume commitment which means, as a consequence, that AT&T's rivals will not make certain sales. As discussed above, the commitments in AT&T contracts still leave substantial volume available to AT&T's rivals. And more generally, as we discussed earlier, the fact that one supplier wins a customer in competition and its rival loses raises no necessary competitive concern.

70. The literature cited by the Commission explains that exclusive (or partial exclusive) contracts offered by incumbent suppliers can potentially deter efficient entry by exploiting a lack of coordination between buyers. More specifically, one paper cited by the Commission stresses that a required condition for exclusive contracts to deter efficient entry "is that the victims – customers or suppliers – must expect that the exclusionary tactic will succeed, and must be unable to coordinate their actions to defeat the tactic."[77] However, under this and related models, if buyers can together signal to an entrant that sufficient demand is available to make entry profitable, then a supplier will not be able to "buy off" customers by inducing them into entering exclusive contracts (with the effect of deterring entry).

71. As this suggests, the risk that exclusive or partial exclusive contracts will result in harm to competition will be small when a single buyer can sponsor entry or coordination problems are small, as appears to be the case in the context of the provision of special access services. As discussed above, CLEC fiber rings are in close proximity to many buildings,

77. Rasmusen, Ramseyer and Wiley, Jr. 2000, p. 310.

especially throughout urban areas, and we understand that CLECs often find it profitable to establish a building connection to serve even a single large customer.[78]

72. Under these circumstances, *no* coordination between customers would be necessary to attract a CLEC to construct a building-specific special access circuit from a nearby fiber loop. Moreover, coordination problems relating to special access services could be solved by a building owner that can act as the agent for all customers in its building to attract entry. Even more generally, coordination problems are reduced due to the role that CLECs play as both retail and wholesale suppliers of access services, and the multiple sources of information about building demand reduce the coordination problems that are the focus of the concerns about potential foreclosure that are stressed in the economic literature.

73. Overall, we emphasize again that even if the portability/volume commitments could function effectively as a mechanism for "locking up" demand, they could only have an anticompetitive effect if they (i) successfully "locked up" a large portion of total demand, (ii) deterred entry or expansion by rivals; and (iii) resulted in higher prices. However, as shown above, AT&T's DS-1 sales are declining rapidly as customers move to Ethernet services, which are provided by a wide range of CLECs, including cable companies. AT&T's sales under portability/volume commitments account for only a modest portion of total sales available to CLECs. Our analysis shows that customers accounting for a large volume of AT&T's DS-1 sales face no early termination liability and thus are available to CLECs because they either (i) roll off of longer-term contracts not subject to portability commitments; (ii) are purchased under month-to-month contracts; or (iii) have available headroom under existing portability contracts and so can transfer circuits to rivals without penalties.

78. As discussed above in ¶42, Level 3's CFO Sunit Patel has stated that investments to connect a large client are "paid off quickly – within six months to two years depending on the length of the contract."

3. Economic Literature Relating to Strategic Tying

74. The Commission also cites Carlton and Waldman in support of its concerns about anticompetitive foreclosure.[79] This paper addresses how the tying of complementary products can be used to preserve and create monopoly positions. In particular, Carlton and Waldman show how tying can be used to preserve monopoly power by deterring entry, and how a monopolist in one market can employ tying to extend its monopoly into a newly emerging market.[80]

75. The model presented in that paper, however, does not relate directly to analysis of the competitive impact of the AT&T tariffed pricing plans at issue, which do not involve tying special access services to any other service provided by AT&T – the tariffs at issue are specific to TDM DS-1 circuits only and DS-1 purchases in one area and there are many contracts where there is no tie or connection between what is done in one area and what is done in another. If the Commission means to suggest, for example, that the tariffs at issue enable AT&T to use market power in one geographic area (*e.g.*, remote areas where only AT&T provides special access) to deter entry in other areas (*e.g.*, dense cities where AT&T faces many rivals) through tying purchases between the areas, then the economic model presented in the paper would not directly apply here given the nature of the AT&T tariffs at issue, which do not condition pricing or sales in one area with a customer's purchases in other geographic areas. To the extent the Commission is arguing that AT&T is leveraging market power in remote areas into more competitive areas such as dense cities, AT&T cannot succeed in raising the price of special access to a customer in the dense city who has no need for AT&T special access in the remote

79. Order, note 54.

80. Carlton and Waldman 2002, p. 194. Although the Commission's logic is only briefly described in a footnote, the Commission appears to suggest that tying of sales between regions may exacerbate concerns about anticompetitive foreclosure when multimarket entry is efficient. Order, note 54.

area since AT&T has no leverage over that customer and since we have shown that rivals have a significant presence in such dense areas. Since AT&T does not discriminate in pricing to customers in dense cities, then AT&T would be unable to charge higher prices to the customers in dense cities over whom it does have market power in remote areas unless it was willing to lose all those customers that do not require services in the remote areas to rivals.

VERIFICATION

I hereby swear under penalty of perjury that, based on the best information available to me, the foregoing is true and correct.

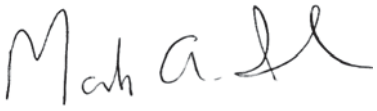
/s/

Dennis W. Carlton

Dated: January 7, 2016

VERIFICATION

I hereby swear under penalty of perjury that, based on the best information available to me, the foregoing is true and correct.



/s/
Mark A. Israel

Dated: January 7, 2016

VERIFICATION

I hereby swear under penalty of perjury that, based on the best information available to me, the foregoing is true and correct.

/s/

Allan L. Shampine

Dated: January 7, 2016

VERIFICATION

I hereby swear under penalty of perjury that, based on the best information available to me, the foregoing is true and correct.

/s/ Hal S. Sider

Hal S. Sider

Dated: January 7, 2016

ATTACHMENT 4

ATTACHMENT 4.A

Spreadsheets containing AT&T's responses to Tables I-IX are being provided in the CD accompanying AT&T's Direct Case.

ATTACHMENT 4.B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

DESCRIPTION OF AT&T'S RESPONSES TO TABLES I-IX

January 8, 2016

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DISCUSSION OF AT&T'S RESPONSES TO TABLES I-IX

AT&T is providing the following discussion to aid Commission Staff in understanding AT&T's responses to Tables I-IX. The explanations contained herein are in addition to the material that the instructions to Tables I-IX asked to be provided in narrative form in a separate Word document. This separate Word document can be found in the document entitled "AT&T's Narrative Responses to Tables I-IX," which is included as Attachment 4.C to AT&T's Direct Case.

TABLE I – TARIFF PRICING PLAN DATA

AT&T's response to Table I is contained in the Excel file entitled "AT&T Table 1 (HIGHLY CONFIDENTIAL)." This Excel file, as well as all other Excel files discussed below are being provided on the CD accompanying AT&T's Direct Case.

The instructions for Table I state that a narrative response must be provided in a separate Word document for several of the columns (*i.e.*, Columns I-N, R, T, V, Z-AE, AG, AK, and AM). The required narrative for these columns can be found in Attachment 4.C to AT&T's Direct Case. This section describes AT&T's responses to the remaining columns in this table.

Columns A, B, and C contain the relevant tariff names, pricing plan names, and tariff section numbers. Column D identifies whether a customer electing the pricing plan must agree to a percentage commitment (1 for yes, 0 for no). This entry is marked as "1" for Ameritech Operating Companies Tariff F.C.C. No. 2, Discount Commitment Plan, § 7.4.13 ("Ameritech DCP") and BellSouth Telecommunications Tariff F.C.C. No. 1, Area Commitment Plan, § 2.4.8(B) ("BellSouth ACP"). The Ameritech DCP contains a 90 percent commitment. The BellSouth ACP allows customers to choose how many services to place under the plan, and the

customer must then maintain the full amount committed to avoid shortfall liability. The entry is marked as "0" for the Southwestern Bell Telephone Company Tariff F.C.C. No. 73, DS1 Term Payment Plan, § 7.2.22 ("SWBT DS1 TPP") and the Pacific Bell Telephone Company Tariff F.C.C. No. 1, DS1 Term Payment Plan, § 7.4.18 ("PacBell DS1 TPP") because these plans do not require customers to make a percentage commitment; the percentage commitment under these plans is a component of the optional portability feature. If the customer chooses the optional portability feature, there is an 80 percent commitment level.

Column E identifies whether any customer electing the pricing plan is given an option to agree to a percentage commitment (1 for yes, 0 for no).[1] Column F identifies whether any customer electing the pricing plan must make all of its purchases for the given business data services from AT&T under the plan (1 for yes, 0 for no). All of the AT&T pricing plans under investigation allow customers to purchase services under other AT&T pricing plans; accordingly, all of the entries in this column are "0". Column G identifies whether the pricing plan mandates "circuit portability" (1 for yes, 0 for no).[2] Column H identifies whether the pricing plan includes circuit portability as an option, outside the pricing plan. AT&T does not offer portability for the

[1] Only the PacBell and SWBT DS1 TPPs give the customer an option to make a percentage commitment. *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E). Accordingly, the entries for these plans in Column E are "1". Under the BellSouth ACP, the purchaser chooses the number (not percentage) of services to commit, *see* BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B), and the Ameritech DCP requires a percentage commitment, *see* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B). Accordingly, the entries for these plans are "0".

[2] The BellSouth ACP and Ameritech DCP include circuit portability as a basic feature; accordingly, the entries for these plans in Column G are "1". The PacBell and SWBT DS1 TPPs give customers the option to choose circuit portability, but do not require it. *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E). Accordingly, the entries for these plans are "0".

services under these tariffs in other tariff pricing plans; accordingly, all of the entries in this column are "0".

Column O contains the minimum percentage of the volume commitment for DS1 channel terminations that must be maintained to avoid incurring a shortfall penalty.[3] Columns P and Q similarly contain the minimum percentage of the volume commitment for DS3 channel terminations and other TDM business data services that must be maintained in order to avoid a shortfall penalty.[4] Columns S and U contain, respectively, the maximum number of circuits that AT&T can migrate in one day for a purchaser and the charge for this service. None of the AT&T tariff pricing plans under investigation limit the maximum number of circuits that can be migrated in one day or charge for migration. Accordingly, all of the entries in these columns are "-9999".

Column W identifies whether any purchaser under the tariff pricing plan may count Ethernet purchases towards its percentage for DS1 channel terminations (1 for yes, 0 for no, or -

[3] For the Ameritech DCP, the minimum level is 90 percent. *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B). For the PacBell and SWBT DS1 TPP portability options, the minimum level is 80 percent. *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(b); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(b). For the BellSouth ACP, the level is 100 percent; however, the customer chooses its own commitment level. *See* BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B).

[4] DS3 service is not offered under any of the AT&T tariff pricing plans under investigation; accordingly all of the entries in Column P are "-9999." In Column Q, the entries for the Ameritech DCP, the PacBell DS1 TPP, and the SWBT DS1 TPP are also "-9999" because the volume commitments under these plans are based on the number of local distribution channels that are committed. *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B); Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4). Only the BellSouth ACP allows the customer to base its volume commitment on other TDM business data services. *See* BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B). The BellSouth ACP requires the customer to maintain 100 percent of its commitment level for all services; however, the customer is free to choose the commitment level. *See id*.

9999 for not applicable).[5] Column X and Column Y identify whether the purchaser under the tariff pricing plan may count Ethernet purchases towards its percentage commitment for DS3 channel terminations or other TDM business data services.[6]

Column AF identifies whether the tariff pricing plan has an upper percentage threshold, above which an overage penalty is triggered if a customer's purchases exceed that threshold (1 for yes, 0 for no).[7] Column AH contains the maximum percentage of the volume commitment for DS1 channel terminations that a customer may purchase and maintain without incurring an overage penalty.[8] Columns AI and AJ contain, respectively, the maximum percentage of the

[5] The AT&T pricing plans under investigation do not permit Ethernet services to be counted toward the commitment levels.

[6] The AT&T tariff pricing plans under investigation do not apply to DS3 services; accordingly, all of the entries in Column X are "-9999." In Column Y, all of the entries for the Ameritech DCP and the PacBell and SWBT DS1 TPPs are "-9999" because the volume commitments under these plans are based on the number of local distribution channels, and not "other" forms of TDM business data service. *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B); Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4). The BellSouth ACP allows the customer to base its volume commitment on other TDM business data services; however, the entry for this plan in Column Y is "0" because this plan does not allow the purchaser to count Ethernet purchases towards its commitment.

[7] The Ameritech DCP, PacBell DS1 TPP portability option, and SWBT DS1 TPP portability option have upper percentage thresholds. *See* Ameritech Operating Companies, F.C.C. Tariff No. 2, § 7.4.13(B); Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22 (E)(4)(c). Accordingly, the entries for these three plans are "1". There is no upper percentage threshold under BellSouth ACP. *See* BellSouth Telecommunications, F.C.C. Tariff No. 1, § 2.4.8(B). Accordingly, the entry for this plan is "0".

[8] Under the Ameritech DCP, the upper percentage threshold is 130 percent for a three-year agreement and 150 percent for a five-year agreement. *See* Ameritech Operating Companies, F.C.C. Tariff No. 2, § 7.4.13(B). For the PacBell and SWBT DS1 TPP portability option, the upper percentage threshold is 124 percent. *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.1(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(c). The BellSouth ACP does not have an upper percentage threshold. *See* BellSouth Telecommunications, F.C.C. Tariff No. 1, § 2.4.8(B). Accordingly, the entry for this plan is "-9999".

volume commitment for DS3 channel terminations and other TDM business data services that a customer may purchase and maintain without incurring an overage penalty.[9]

Column AL identifies whether the pricing plan includes a provision for automatic increase of the volume commitment in the event of an overage (1 for yes, 0 for no). None of the AT&T tariff pricing plans at issue in this investigation contain such a provision; accordingly, the entries for all four pricing plans are "0".

[9] All entries in Column AI are "-9999" because the AT&T pricing plans at issue in this investigation do not cover DS3 channel terminations. All of the entries in Column AJ are also "-9999". The upper percentage thresholds in the PacBell and SWBT DS1 TPP portability options and under the Ameritech DCP apply to the number of Local Distribution Channels, and not other types of TDM business data service. *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.1(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(c); Ameritech Operating Companies, F.C.C. Tariff No. 2, § 7.4.13(B). Under the BellSouth ACP, the customer can choose a volume commitment based on other types of TDM business data services; however, the ACP does not have an upper percentage threshold. *See* BellSouth Telecommunications, F.C.C. Tariff No. 1, § 2.4.8(B).

TABLE II.A – INCIDENCE OF DISCOUNTED PURCHASES

AT&T's response to Table II.A is contained in the Excel file entitled "AT&T Table 2 (HIGHLY CONFIDENTIAL)" under the tab entitled "Table IIA – Discounted Purch."

Columns A, B, C, and Column D identify, respectively, the tariff, pricing plan name, section number, and calendar year. Columns E, F, and G contain, respectively, the average number of in-service DS1 channel terminations, DS3 channel terminations, and other TDM business data services sold at pricing under the tariff pricing plan during the calendar year.[10] Column H identifies the category of other TDM business data service that corresponds to each row of data (where applicable). To the extent that Column H also requires narrative discussion in a separate Word document, this narrative is provided in Attachment 4.C to AT&T's Direct Case. Columns I, J, and K contain, respectively, the revenue for all DS1 channel terminations, DS3 channel terminations, and other TDM business data services sold under the tariff pricing plan for the calendar year. Column L contains the revenue for all business data services sold under the tariff pricing plan for the calendar year.[11]

[10] Because DS3 channel terminations are not available under the AT&T tariff pricing plans under investigation, all of the entries in these columns related to DS3 volumes are "0". AT&T is providing data regarding other types of TDM business data services separately for each type of service identified.

[11] The dollar amounts are the totals of the corresponding rows of Columns I, J, and K. The total annual revenue under each pricing plan can be calculated by taking the sum of the three entries for the year.

TABLE II.B – INCIDENCE OF UNDISCOUNTED PURCHASES

AT&T's response to Table II.B is contained in the Excel file entitled "AT&T Table 2 (HIGHLY CONFIDENTIAL)" under the tab entitled "Table IIB – Undiscounted Purch."

Columns A and B identify, respectively, the relevant tariffs and years. Columns C, D, and E contain, respectively, the average number of in-service DS1 channel terminations, DS3 channel terminations, and other related TDM business data services sold at the regular undiscounted rate under the tariff during the relevant calendar year. Column F identifies the category of other TDM business data service that corresponds to each row of data (where applicable). To the extent that Column F also requires narrative discussion in a separate Word document, this narrative is provided in Attachment 4.C to AT&T's Direct Case. Columns G, H, and I contain, respectively, revenue for DS1 channel terminations, DS3 channel terminations, and other related TDM business data services sold at the regular undiscounted rates under the tariff during the relevant calendar year. Column J contains the revenue for all business data services sold at the regular undiscounted rate under the tariff during the calendar year.[12]

[12] The dollar amounts in each row represent the sum of the dollar amounts in the corresponding rows of Columns G, H, and I. The total annual revenue under each tariff can be calculated by taking the sum of these entries for the year. AT&T sells numerous services under its special access tariffs under month-to-month arrangements. Because the AT&T tariffs under investigation by the Commission relate to only to DS1 services, AT&T has provided information in this table for the DS1 and DS3 services it offers under month-to-month arrangements.

TABLE III – PURCHASE AGREEMENTS OR SUBSCRIPTIONS TO TARIFF PRICING PLANS AND TERMS

AT&T's response to Table III is contained in the Excel file entitled "AT&T Table 3 (HIGHLY CONFIDENTIAL)."

Column A contains a unique "Agreement ID" for each agreement.[13] Column B identifies the start date for each agreement.[14] Column C identifies the expiration date of the agreement; if the agreement was extended, the date in this column represents the date that the extended agreement expired.[15] Column D contains a field that was not requested by the Commission, but that is needed to properly identify the volume-based commitment levels. Specifically, Column D identifies the dates on which customers either increased or decreased their commitment levels

[13] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[14] Under AT&T's tariffs, customers purchase services on a circuit-by-circuit basis for a chosen term. Customers who subscribe to the portability option enter into a separate agreement that includes a volume commitment. This table seeks information about the volume commitments associated with the portability plans. Accordingly, the start and end dates provided in the table are those for the portability agreements, not those associated with the circuit-specific term plans. Specifically, for the DS1 TPP plans the table provides data only for customers who choose the portability option, because customers who do not choose the portability option do not make volume commitments. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[15] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

under an existing agreement, which enables the chart to show changes in the commitment levels during the term of a portability plan.[16] Columns E, F, and G identify, respectively, the tariff name, pricing plan and section number. Column H identifies the name of the purchaser.[17] Column I, J, and K identify, respectively, whether the purchaser is an end user, competitive provider, or mobile wireless provider.[18] Column L contains unique Purchaser ID numbers.[19] Columns M, N, and O identify, respectively, the volume commitments for DS1 channel terminations, DS3 channel terminations,[20] and other TDM business data services[21] under each pricing plan.[22] Column P identifies the relevant category of other TDM business data service for

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[16] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[17] In some instances multiple affiliates of the same entity may purchase services from AT&T. The table identifies the affiliate name in these instances.

[18] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[19] AT&T does not in the ordinary course of business maintain "Purchaser ID" numbers that are linked to the data requested for this table. AT&T has therefore generated the Purchaser ID numbers in Column L for purposes of responding to this request.

[20] Because DS3 channel terminations are not available under any of the AT&T tariff pricing plans under investigation, all of the entries in Column N are "-9999".

[21] Because the volume commitments in the DCP and DS1 TPPs are based on the number of DS1 channel terminations, the entries for other TDM business data services also in Column O are "-9999". Only AT&T's BellSouth ACP has commitments for other TDM business data services. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[22] The volume commitments in Columns M, N, and O are provided as of the start date of the agreement and, where applicable, the date of the commitment level change. **[BEGIN HIGHLY**

each row of data (where applicable).[23] Column Q indicates whether the volume commitments is set equal to the quantity of purchases on the start date (*i.e.*, the data of signing) (1 for yes, 0 for no).[24] Columns R and S require narrative discussion in a separate Word document, which is provided in Attachment 4.C to AT&T's Direct Case. Column T is an additional field not requested by the Commission, which accounts for the fact that the Commitment levels under AT&T's Ameritech DCP are made on a state-by-state basis. This column identifies the relevant state. For the other tariffs, Column T identifies the general geographic region (Southwest (Southwestern Bell), West (Pacific Bell), Southeast (BellSouth)).

TABLE IV – SUCCESSOR DATA TABLE

AT&T's response to Table IV is contained in the Excel file entitled "AT&T Table 4 (HIGHLY CONFIDENTIAL)." AT&T does not maintain data on predecessor and successor agreements as requested in this table in the ordinary course of business. AT&T's responses in this table are based on AT&T's best efforts to match successive customer agreements.

Columns A and C contain the unique "Agreement ID" for the successor agreement and predecessor agreement, respectively.[25] Columns B and D identify the start date of the successor agreement and end date of the predecessor agreement, respectively. Column E contains a field

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CONFIDENTIAL] [redacted]

[END HIGHLY CONFIDENTIAL]

[23] To the extent that Column P also requires narrative discussion in a separate Word document, this narrative is provided in Attachment 4.C to AT&T's Direct Case.

[24] All entries in this column are zero. The BellSouth ACP allows customers to choose the number of services to commit. The commitment level for the Ameritech DCP excludes services purchased under certain other pricing plans. The commitment level for the DS1 TPP is based on the number of channel terminations purchased in the prior month, not on the start date of the portability plan.

[25] *See* footnote 13, above.

that was not requested by the Commission, but that is needed to properly identify the true volume-based commitment levels. Specifically, Column E identifies the dates on which customers either increased or decreased their commitment levels under an existing agreement.[26] Columns F, G, and H identify the successor volume commitments for DS1 channel terminations, DS3 channel terminations, and other TDM business data services.[27] Columns I, M, and O identify the relevant category of other TDM business data service for each row of data (where applicable). To the extent that these columns also require narrative discussion in a separate Word document, those narratives are provided in Attachment 4.C to AT&T's Direct Case. Columns J, K, and L identify the predecessor volume commitments for DS1 channel terminations, DS3 channel terminations, and other TDM business data services.[28] Finally, Columns N, O, and P identify the predecessor volume commitments for DS1 channel terminations, DS3 channel terminations, and other TDM business data services as of the end date of the predecessor agreement.[29]

[26] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[27] Because DS3 channel terminations are not available under any of the AT&T tariff pricing plans under investigation, all of the entries in these columns related to DS3 commitments are "-9999". Similarly, because the volume commitments in the DCP and DS1 TPPs are based on the number of DS1 channel terminations, the entries for other TDM business data services for these plans are also "-9999". Only AT&T's BellSouth ACP has commitments for other TDM business data services.

[28] *See* footnote 27, above.

[29] *See* footnote 27, above.

TABLE V – ETHERNET FULFILLMENT OF

PERCENTAGE COMMITMENT DATA

The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments. Accordingly, there is no information for AT&T to report in Table V.

TABLE VI – SHORTFALL DATA

AT&T's response to Table VI is contained in the Excel file entitled "AT&T Table 6 (HIGHLY CONFIDENTIAL)".

Columns A and B identify, respectively, the beginning and end dates of the shortfall period. The tariff pricing plans under investigation evaluate and assess shortfall liability on a monthly basis. Accordingly, the "start" and "end" dates are the same date, indicating the month in which AT&T's billing records identify billed shortfall liability. If a shortfall occurs in multiple months, the table contains a separate entry for each such month. Column C contains a unique "Agreement ID" for each agreement.[30] Columns D, E, and F identify, respectively, the tariff names, pricing plan names, and tariff section numbers. Columns G, H, and I identify the committed number of DS1 channel terminations, DS3 channel terminations, and other TDM business data services as of the shortfall start date prior to the shortfall occurrence.[31] Columns J and P identify the relevant category of other TDM business data service for each row of data (where applicable). To the extent that these columns also require narrative discussion in a separate Word document, those narratives are provided in Attachment 4.C to AT&T's Direct Case. Column K contains the total shortfall liability in dollars assessed in connection with this shortfall. Column L calls for a separate narrative response. Columns M, N, and O identify, respectively, the total shortfall of DS1 channel terminations, DS3 channel terminations, and other TDM business data services incurred by the purchaser during the shortfall period.[32] Similarly, Columns Q, R, and S contain the total shortfall, measured in dollars, for DS1 and DS3

[30] *See* footnote 13, above.

[31] *See* footnote 27, above.

[32] *See* footnote 27, above.

channel terminations and other TDM business data services incurred by the customer during the shortfall period.[33]

[33] *See* footnote 27, above.

TABLE VII – OVERAGE DATA

AT&T's response to Table VII is contained in the Excel file entitled "AT&T Table 7 (HIGHLY CONFIDENTIAL)."

The instructions for Table VII state that a narrative response must be provided in a separate Word document for several of the columns (*i.e.*, Columns G, I, M, Q, V, Z, and AC). The required narrative responses can be found in Attachment 4.C to AT&T's Direct Case.

Columns A and B identify the beginning and end dates of the overage period. Column C contains a unique "Agreement ID" for each agreement.[34] The tariff pricing plans under investigation evaluate and assess shortfall liability on a monthly basis. Accordingly, the "start" and "end" dates are the same date, indicating the month in which AT&T's billing records identify billed shortfall liability. If a shortfall occurs in multiple months, the table contains a separate entry for each such month. Columns D, E, and F identify, respectively, the relevant tariff names, pricing plan names, and tariff section numbers. Column G identifies the upper percentage threshold associated with the pricing plan as a percentage of the commitment level.[35] To the extent that Column G also requires a narrative response in a separate document, that response is provided in Attachment 4.C to AT&T's Direct Case. Column H identifies the fee in dollars assessed for the overage occurrence, or the total fee in dollars that would have been assessed. Columns J, K, and L identify, respectively, the number of DS1 channel terminations,

[34] *See* footnote 13, above.

[35] For the Ameritech DCP, there are two possible upper percentage thresholds. For three-year agreements, the upper percentage threshold is 130%; for five-year agreements, the upper percentage threshold is 150%. Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B). The percentage indicated is the percentage that is relevant to that agreement. For the PacBell and SWBT DS1 TPPs, the upper percentage threshold is 124%. Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(c). There is no upper percentage threshold for the BellSouth ACP.

DS3 channel terminations, and other TDM business data services by which the customer's purchases exceeded the upper percentage threshold.[36] Columns N, O, and P identify the amount in dollars by which DS1 channel terminations, DS3 channel terminations, and other TDM business data services actually purchased exceeded the relevant upper percentage thresholds during the overage period.[37]

Column R indicates whether the volume commitment was increased as a result of the overage assessment, whether through renegotiation or required by the terms of the pricing plan (1 for yes, 0 for no).[38] Columns S, T, and U call for the number by which the customer increased its volume commitment for DS1 channel terminations, DS3 channel terminations, and other TDM business data services. Columns W, X, and Y call for the amount in dollars that the volume commitment for purchase of DS1 channel terminations, DS3 channel terminations, and other TDM business data services was increased as a result of the purchaser exceeding the upper threshold of the pricing plan. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

Columns AA and AB call for information as to whether the overage was actually paid and the amount of the overage payment. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[36] *See* footnote 27, above.

[37] *See* footnote 27, above. For the DCP, the overall overage penalty is assessed based on all circuits above the commitment level, and this total liability is identified in Column H. By contrast Columns N seeks only the amount that would have been assessed for the circuits above the upper threshold. As a result, the entries in Column N is lower than the amount in Column H for the DCP. Under the DS1 TPP, overage liability is assessed only on the incremental circuits above the upper threshold, and thus the amounts in Columns N and H are the same.

[38] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] **[END HIGHLY CONFIDENTIAL]**

TABLE VIII – TERM DISCOUNTS DATA

AT&T's response to Table VIII is contained in the Excel file entitled "AT&T Table 8 (HIGHLY CONFIDENTIAL)."

Columns A, B, C, and D identify, respectively, the relevant tariff, pricing plan, and year.[39] Columns E through N identify the total annual revenue for purchases of business data services by competitive provider purchasers under the pricing plan for terms of one year or less. Columns O through X contain similar data for purchases of business data services by mobile wireless providers. Columns Y through AH provide similar data for purchases of business data services by end-user purchasers.

[39] To the extent that Column C also requires a narrative response in a separate document, that response is provided in Attachment 4.C to AT&T's Direct Case.

TABLE IX – EARLY TERMINATION DATA

AT&T's response to Table IX is contained in the Excel file entitled "AT&T Table 9 (HIGHLY CONFIDENTIAL)."

Column A identifies the tariff under which the early termination occurred.[40] Column B identifies the date that the customer terminated the agreement (*i.e.*, the early termination date). Column C identifies the expiration date of the agreement; in cases where the customer extended the original term of the agreement, the date that the extended agreement expired is listed.[41] Column D contains a unique Customer Name for each agreement.[42] Column E identifies the fee,

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[40] This response provides the requested information about early termination liability associated with the provisions identified by the Commission in footnote 266 of the Designation Order. For the DS1 TPP plans, termination liability applies only for services not purchased under the portability option. As a result, these agreements do not tie back to the agreements listed in Table III (which relate to commitments associated with the portability option). Early termination liability for the DS1 TPPs are assessed on a circuit-by-circuit basis, and thus the table identifies early termination liability in this manner. Early termination fees technically do not apply under the Ameritech DCP and BellSouth ACP because they are portability plans. Instead, customers can "buy down" (*i.e.*, pay to reduce) their commitment level under these plans, which could be viewed as similar to an early termination fee. *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(E); BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B). The provisions identified in Table IX for the DCP and ACP address termination liability for customers that choose to "buy down" their volume commitment levels. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[41] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[42] Under the TPP, only customers who do not choose the portability option – *i.e.,* the option with a volume commitment – incur early termination liability. Accordingly, early termination liability are under arrangements that are distinct from the portability arrangements reported in Table III. As a result, there are no unique Agreement IDs for arrangements associated with early termination liability under the TPP that can be linked to the portability arrangements reported in

in dollars, that was charged to the customer for early termination of the agreement. Column F calls for a narrative explanation of how the termination fee was calculated; this narrative response can be found in Attachment 4.C to AT&T's Direct Case. Column G identifies the term of the agreement in months. Columns H, I, and J identify, respectively, the number of DS1 channel terminations, DS3 channel terminations, and other TDM business data services committed for purchase but not purchased or maintained between the early termination date and the agreement end date.[43] Columns K calls for a separate narrative response. Columns L identifies the total dollar amount of DS1 channel terminations committed for purchase but not purchased or maintained between the early termination date and the agreement end date.[44] Columns M and N provide the same information regarding DS3 channel terminations and other TDM business data services.[45] Column O calls for a separate narrative response.

Table III. For this reason, AT&T instead reports the name of the customer that incurred the early termination liability in the "Agreement_ID" field for the DS1 TPP plans. The other plans can be linked to the Table III using the unique Agreement ID provided in Table IIII, and this Agreement ID is thus populated with that Agreement_ID.

[43] *See* footnote 27, above.

[44] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[45] *See* footnote 27, above.

ATTACHMENT 4.C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

AT&T'S NARRATIVE RESPONSES TO TABLES I-IX

January 8, 2016

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

AT&T'S NARRATIVE RESPONSES TO TABLES I-IX

TABLE I NARRATIVE RESPONSES

1. **Circuit_Portability_Method_Expl**

Paragraph 63, Variable Identifier 3: "Provide a narrative description of all circuit portability plans in the tariff pricing plan, including any additional provisions pertaining to a circuit portability option included in the tariff pricing plan. In addition, provide the actual text of these provisions."

A. **Narrative Descriptions**

i. *Ameritech Operating Companies, F.C.C. Tariff No. 2, § 7.4.13 – Discount Commitment Plan (DCP)*

The Ameritech Discount Commitment Plan ("DCP") offers customers term-based discounts. The DCP applies to Direct Analog,[1] Base Rate,[2] and DS1 services, including channel mileage, channel mileage termination, DS1 to voice/Base Rate Multiplexers, and local channel distribution channels (*i.e.*, channel terminations).[3] Customers sign up for a separate DCP for each state within the Ameritech region.[4] For each state, the customer chooses a term of either three years or five years.[5] The term discounts available under the DCP vary somewhat from state-to-state and zone-to-zone. For example, a customer who chooses the three-year DCP term

[1] Direct Analog services are voice grade services.

[2] Base Rate services are low bandwidth data services.

[3] *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B).

[4] *Id.* § 7.4.13(A).

[5] *Id.*

receives a discount of about 53 percent from month-to-month rates; a customer who chooses the five-year DCP term receives a discount of about 58 percent from the month-to-month rates.[6]

The DCP includes a portability feature. When a customer signs up for a DCP term plan, the customer also agrees to maintain a "Commitment Level" equal to 90 percent of the customer's in-service local distribution channels ("LDCs") (*i.e.*, channel terminations for Direct Analog, Base Rate and DS1 services).[7] A separate Commitment Level is set for each state in the Ameritech region.

The portability feature permits the customer to disconnect and move as many circuits as the customer would like prior to the expiration of the term without incurring any early termination liability as long as the total number of circuits under the plan remains above the commitment level and below 130 percent (for a three-year plan) or 150 percent (for a five-year plan) of the number of in-service LDCs used to compute the Commitment Level.[8]

If the number of in-service LDCs falls below the Commitment Level, the customer has multiple options. *First*, the customer may reduce its Commitment Level for no charge by migrating circuits from the DCP to the OPP; each circuit migrated to the OPP plan will result in a corresponding reduction to the DCP Commitment Level.[9] *Second*, the customer can "buy down" its Commitment Level by paying a fee.[10] *Third*, the customer can become compliant (*i.e.*, return to in-service LDCs above the commitment level) within 90 days, in which case no shortfall penalties are assessed.[11] *Fourth*, the customer can pay a shortfall fee for the months in which its in-service LDCs were less than the Commitment Level.[12]

If the number of in-service LDCs exceeds 130 percent (for a three-year plan) or 150 percent (for a five-year plan) of the number of in-service LDCs used to compute the Commitment Level, the customer has multiple options. *First*, the customer can increase its Commitment Level so that it is no longer above the threshold within 90 days.[13] *Second*, the

[6] *See id*. § 7.5.9(B)(1). These discounts are based on Zone One rates in Illinois.

[7] *Id*. § 7.4.13(B).

[8] *Id*.

[9] *Id.* § 7.4.13(G).

[10] *Id*. § 7.4.13(E).

[11] *Id.* § 7.4.13(C).

[12] Under the DCP's shortfall provision, if a customer's actual in-service level falls below the Commitment Level, the customer will continue to be billed for the commitment level of LDCs at the normal DCP rates. *Id.* § 7.4.13(B) ("For example, a customer with 100 Base Rate LDCs that commits 90 LDCs but only has 70 LDCs in servcie will be billed the DCP rates for 90 LDCs.").

[13] *Id*. § 7.4.13(C) & (D).

customer can pay an overage fee for each month during which the customer's in-service LDCs exceed the threshold.[14]

ii. *BellSouth Telecommunications Tariff F.C.C. No., § 2.4.8(B) – Area Commitment Plan (ACP)*

The BellSouth Area Commitment Plan ("ACP") is a term discount plan that includes portability. The customer chooses a term within "Plan A" (24-48 months) or within "Plan B" (49-72 months).[15] The discount for Plan B is higher than for Plan A. The customer can choose any term within the ranges for Plan A or Plan B, but the discount is the same within each plan (*e.g.*, the customer receives the same discount under Plan A whether the customer chooses a 24-month or a 48-month term).[16] The discounts are provided in the form of credits in the next month.[17] The discounts under the ACP are the same as those in AT&T's Channel Services Payment Plan ("CSPP") tariff,[18] which is not subject to this investigation.

The ACP also includes a portability component. There is no percentage or other volume commitment under the ACP. Rather, the customer chooses how many of each rate element to place in the ACP.[19] The ACP term discounts and portability components apply on a rate element-by-rate element basis. Accordingly, customers separately choose the number of DS1 local channels, interoffice channel mileage, and interoffice channels to place within the plan, and the term for each element.[20]

Once the customer places a number of rate elements into the ACP, the customer must maintain that number for the duration of the chosen term. For example, if the customer places ten DS1 local channels under a 24-month ACP plan, the customer must maintain at least ten DS1s under the ACP for the duration of the 24-month period. During that time, however, the customer can disconnect as many services as it likes without incurring early termination liability, as long as it maintains the commitment level. This allows the customer to, among other things, move as many services as it wants during the term of the plan without incurring early termination liability.

If the number of in-service rate elements under the ACP is less than the chosen commitment level, a shortfall charge will apply. The shortfall charge is equal to the difference

[14] If a customer's in-service level exceeds the initial in serve level by more than 30 percent for a three year term or 50 percent for a 5 year term, the customer will be billed the monthly rate for all LDCs above the commitment level. *Id.* § 7.4.13(B).

[15] BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B). Effective May 15, 2015, AT&T stopped offering new Plan B contracts with commitment periods of 61-72 months. The longest Plan B term available after this date has been 60 months. Existing ACPs were not affected by this change. *See id.* § 2.4.8(B) n.1.

[16] *See id.*

[17] *Id.*

[18] *Id.* § 2.4.8(A).

[19] *Id.* § 2.4.8(B).

[20] *Id.*

between the customer's commitment level and the number of in-service rate elements of the relevant type (Local Channel, Multiplexer, or Channel Mileage) multiplied by 50 percent of the applicable ACP rate.[21]

A customer who wishes to avoid a shortfall charge can cancel the ACP agreement and initiate a new one with a lower Commitment Level. This will result in a termination charge equal to the ACP rate associated with the existing agreement multiplied by the difference in months between the time the ACP agreement has been in effect and the minimal months (*i.e.*, 24 months for Plan A and 49 months for Plan B) of the existing agreement times a factor (*i.e.*, 20 percent for agreements that have been in effect for longer than 12 months or 40 percent for agreements that have been in effect for 12 months or less).[22]

iii. *Pacific Bell Tariff F.C.C. No. 73, § 7.4.18 and Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 7.2.22 – DS1 Term Commitment Plan (DS1 TPP)*

The Pacific Bell and Southwestern Bell DS1 Term Commitment Plans ("DS1 TPP") are term discount plans for DS1 services. The terms available under the DS1 TPP are one, two, three, five, and seven years.[23] The majority of the discounts are available under the three-year term (about a 43 percent discount from month-to-month rates).[24] Customers who choose a five- or seven-year term receive a discount of about 52 percent from month-to-month rates.[25] These term plans are subject to early termination liability if the customer disconnects the service before the agreed-upon term ends.[26] The termination liability is equal to 40 percent of the month-to-month rate multiplied by the number of remaining months in the term.[27]

The DS1 TPP has an optional "portability" feature. The portability feature does not include any additional discounts. When a customer chooses the portability feature, a region-wide Commitment Level is set at the number of DS1 Channel terminations purchased from AT&T in the previous month.[28] The customer is then permitted to move circuits or disconnect as many circuits as it wants, regardless of term commitments, without incurring early termination

[21] *See id.*

[22] *See id.*

[23] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(A); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(A).

[24] *See* Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, §§ 7.3.10(F)(1), (F)(10.4); Pacific Bell Telephone Company, Tariff F.C.C. No. 1, §§ 7.5.9(A)(1), (I).

[25] *See* Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, §§ 7.3.10(F)(1), (F)(10.4); Pacific Bell Telephone Company, Tariff F.C.C. No. 1, §§ 7.5.9(A)(1), (I)

[26] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(G); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(G).

[27] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(G)(2); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(G)(2).

[28] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(1); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(1).

liability, as long as the customer maintains a number of in-service DS1 channel terminations within the range of 80 percent and 124 percent of the Commitment Level.[29]

If a customer's TDM-based DS1 channel termination purchases from AT&T fall below 80 percent of the Commitment Level, the customer has multiple options. *First*, the customer can "buy down" (*i.e.*, reduce) its Commitment Level by paying to AT&T an amount equal to the number of decreased DS1 channel terminations multiplied by the month-to-month rate multiplied by the number of months remaining for the portability option.[30] *Second*, the customer can pay a shortfall fee for the months during which the customer's DS1 channel terminations are below 80 percent of the Commitment Level. The shortfall fee is equal to the number DS1 channel terminations below the commitment multiplied by the non-recurring charge for DS1 channel terminations.[31]

If the number of in-service TDM-based DS1 channel terminations exceed 124 percent of the Commitment Level, the customer also has multiple options. *First*, the customer may increase its commitment level so that its in-service DS1 circuits no longer exceed 124 percent of the Commitment Level; there is no charge for such an increase.[32] *Second*, the customer can pay the overage fee for the months in which the number of DS1 channel terminations exceed 124 percent of the Commitment Level. The overage fee is equal to the DS1 nonrecurring channel termination charge multiplied by the difference between the actual number of channel terminations in-service and 124 percent of the Commitment Level.[33]

B. **Tariff Language**

Pursuant to the instructions for Table I, the full text of the Ameritech DCP, BellSouth DCP, Pacific Bell DS1 TPP, and Southwestern Bell DS1 TPP is being provided in a searchable PDF file entitled "AT&T Tariff Excerpts." An electronic version of this PDF file is included on the CD accompanying AT&T's Direct Case; a printed copy of this file is being provided as Attachment 6 to AT&T's Direct Case.

2. **Cost_All**

Paragraph 63, Variable Identifier 4(i): "If Percentage_Commit is reported as 1 and All_Or_Nothing is reported as 1, provide narrative description of any cost justification of the percentage commitment in the contest of an all-or-nothing provision."

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[29] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(a); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(a).

[30] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(e); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(e).

[31] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(b); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(b).

[32] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(d); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(d).

[33] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(c).

Not applicable.

3. **Efficiency_All**

Paragraph 63, Variable Identifier 4(ii): "If Percentage_Commit is reported as 1 and All_Or_Nothing is reported as 1, provide narrative description of any efficiency justification for the percentage commitment in the context of an all-or-nothing provision."

Not applicable.

4. **Cost_Port**

Paragraph 63, Variable Identifier 4(iii): "If Percentage_Commit is reported as 1 and EITHER Circuit_Portability_Mandated is reported as 1 OR Circuit_Portability Option is reported as 1, provide a narrative description of any cost justification of the percentage commitment in the contest of a circuit portability provision or option."

The BellSouth ACP does not have a percentage commitment requirement. Rather the customer chooses how many circuits to commit under the ACP.[34] The DCP does have a 90 percent commitment.[35] In addition, customers who choose the portability option under the DS1 TPP are subject to an 80 percent commitment.[36]

The DCP has been in place since December 1992.[37] As explained in the "Description and Justification" submitted with the 1992 filing of that tariff with the Commission: "Customers have requested a time commitment plan which is not circuit specific but is instead based on a service commitment level. This program will allow customers to move Local Distribution Channels within a state and maintain discounted rates."[38] Because this pricing plan was put in place more than 20 years ago, any records that may have existed that address the "cost justification" for the percentage commitment are no longer available. Similarly, the DS1 Term Payment Plans were filed in 2003, and any records that may have existed that address the "cost justification" for the percentage commitments in those plans are also no longer available.

The DCP and DS1 TPPs are portability plans. The portability plans involve a bargain for benefits that are to a significant degree intangible, and the terms of the portability plans reflect the marketplace value the two parties place on those benefits. Portability does not exist in isolation, but rather the parties enter into the portability plans on the understanding that the customer has agreed to purchase a base number of circuits under term-discount plans. The portability plan offers the customer substantial cost savings and increased flexibility by giving the customer the ability to cancel a percentage of its term-plan circuits without penalty. In

[34] BellSouth Telecommunications, F.C.C. Tariff No. 1, § 2.4.8(B).

[35] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B).

[36] Pacific Bell Telephone Company, Tariff F.C.C. No. 2, § 7.4.13(E)(2); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(2).

[37] Transmittal No. 684, Ameritech Operating Companies, Tariff F.C.C. No. 2 (Dec. 21, 1992).

[38] *Id*. (Description and Justification).

return, the customer commits to honor the term-discount plans on the remaining circuits, which gives AT&T the assurance that it will receive the benefit of the underlying term-plan bargains on a reasonable number of circuits. In essence, the parties are shifting much of the risk and costs of premature disconnections to AT&T, and the percentage commitment to honor the remaining term-discount plans reflects the value the parties place on that customer benefit.

Notably, the portability plans require AT&T to incur a variety of costs. For the percentage of circuits that may be canceled prematurely under the plan, AT&T agrees (1) to permit the customer to pay a lower term-discounted rate even though the customer may cancel the service at any time and not abide by the agreed-upon term; (2) to permit the customer to avoid the early termination liability; and (3) to assume the physical costs of the disconnection and re-establishment of service for a new customer if one can be found. AT&T is also forgoing the predictability provided by the underlying term-discount plans that may be terminated prematurely.

AT&T does not levy any additional monetary charge for this portability benefit. The only thing AT&T receives in return is the customer's commitment to honor the remaining term plans. The percentage commitment thus (1) establishes an outer boundary on the uncompensated costs AT&T must bear under the portability plan; (2) ensures that AT&T will receive the benefits it derives from the underlying term-discount plans on the remaining circuits at issue; and (3) protects the integrity of AT&T's overall rate structure, because if AT&T were to agree to waive the early termination liability ("ETL") on a significantly larger percentage of circuits, the availability of such extensive avoidance of ETLs could undermine the bargains that month-to-month and pure term-plan customers have struck with AT&T.

The DCP contains a higher nominal percentage commitment (90 percent) than the DS1 TPP plans, but it is important to note that the commitment level under the DCP is not fixed. Customers of the DCP have flexibility to avoid shortfall penalties by moving circuits to Ameritech's pure term plan (the OPP) at any time, which entitles the customer to take a corresponding reduction in its commitment level under the DCP. Although customers of the DS1 TPP plans do not have the same flexibility to re-assign circuits during the term of the portability plan, the lower percentage commitment (80 percent) gives these customers a wider berth to manage their base of circuits (and, of course, these customers can establish new commitment levels upon renewal at the end of the three-year term of the portability plan).

5. **Efficiency_Port**

Paragraph 63, Variable Identifier 4(iv): "If Percentage_Commit is reported as 1 and EITHER Circuit_Portability_Mandated is reported as 1 OR Circuit_Portability Option is reported as 1, provide a narrative description of any efficiency justification for the percentage commitment in the contest of a circuit portability provision or option."

As noted in the previous response, the BellSouth, LLC Tariff F.C.C. No. 1, Area Commitment Plan ("ACP") does not have a percentage commitment requirement. The other three AT&T tariffs being investigated in this proceeding do have "percentage commitments." These tariffs include: Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13 (Discount Commitment Plan (DCP)); Pacific Bell Telephone Company Tariff F.C.C. No. 1, § 7.4.18 (DS1

Term Payment Plan (TPP)); Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 7.2.22 (DS1 Term Payment Plan (TPP)). The DCP contains a 90 percent commitment[39] and the DS1 TPP tariff pricing plans contain 80 percent commitments.[40] As explained in the previous response, these tariffs were filed many years ago, and whatever records that may have existed that would have addressed the "efficiency justification" for the percentage commitments in those plans are no longer available.

These portability plans provide efficiency benefits. As explained above, the portability plans enable customers to disconnect services prior to the expiration of the agreed upon terms – for which the customer is receiving a significant discount – without incurring early termination liability. The underlying term plans provide well-recognized efficiencies: the customer gets the benefit of lower rates, and AT&T receives the certainty and predictability of the term commitment, which allows it to plan for and achieve more efficient utilization of its network.

Certain wholesale customers experience retail churn at the margins but expect their overall base of circuits to remain relatively stable over the short- and middle-term. Customers in that position asked AT&T to establish the portability plans at issue in an effort to achieve additional efficiency gains. As AT&T explained when it filed the DCP tariff in 1992, "[c]ustomers have requested a time commitment plan which is not circuit specific but is instead based on a service commitment level. This program will allow customers to move Local Distribution Channels within a state and maintain discounted rates."[41] Under the portability plan, customers achieve the additional efficiency of a more frictionless process of moving circuits to other locations or to other providers as the opportunity arises, without having to pay an early termination liability on every single circuit. Because these customers expect their base of circuits to remain relatively stable in the short term, they are willing to enter into a volume commitment to achieve those enhanced efficiencies. The volume commitment, in turn, allows AT&T to realize additional efficiencies, because it gives AT&T a level of certainty and predictability that facilitates more precise and effective planning to achieve the most efficient utilization of its network.

6. **Other_Business_Purpose**

Paragraph 63, Variable Identifier 4(v): "If (1) Percentage_Commit is reported as 1, (2) All_Or_Nothing is reported as 1, and (3) EITHER Circuit_Portability_Mandated is reported as 1, OR Circuit_Protability_Option is reported as 1, then enter a narrative description of the business purpose of these provisions. Response must include detailed discussion of efficiency, cost, or other business purpose of predicating the availability of circuit portability on purchasers making a percentage commitment in the context of an all-or-nothing provision."

Not applicable.

[39] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B).

[40] Pacific Bell Telephone Company, Tariff F.C.C. No. 2, § 7.4.13(E)(2); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(2).

[41] Transmittal No. 684, Ameritech Operating Companies, Tariff F.C.C. No. 2 (Dec. 21, 1992) (Description and Justification).

7. **Percentage_Commit_Other_Desc**

Paragraph 63, Variable Identifier 5(iv): "Where applicable, provide a narrative description of the percentage commitment for other TDM business data services, including the types of other TDM business data services for which a percentage commitment applies, how these services are denominated, the relevant units of measure, and how each type of business data services counts toward this percentage commitment."

This item is not applicable to the DS1 TPP (Pacific Bell and Southwestern Bell) or the DCP (Ameritech). The ACP (BellSouth) does not have a percent commitment. Rather, the customer chooses the commitment level.[42] However, once the customer chooses a commitment level the customer must maintain that commitment level to avoid shortfall charges.[43] Customers under the ACP choose a separate commitment level for the mileage and multiplexing rate elements associated with DS1 local distribution channels. The mileage commitments are measured in miles and the multiplexing commitments are measured in the number of multiplexing services ordered.

8. **Citation_FT_Max_Daily**

Paragraph 63, Variable Identifier 6(ii): "Provide citations and the full text (which may be a searchable PDF) of all provisions in the tariff that limit the number of circuits that the ILEC can migrate in one day, for a given customer."

Not applicable. The AT&T tariff pricing plans under investigation do not have a maximum number of circuits that the ILEC can migrate in one day for a purchaser.

9. **Circuit_Migr_Chg_Expl**

Paragraph 63, Variable Identifier 6(iv): "Where applicable, provide a narrative description of the circuit migration charge, including the types of business data services circuits involved, and how they are charged."

Not applicable. The AT&T tariff pricing plans under investigation do not have a maximum number of circuits that the ILEC can migrate in one day for a purchaser.

10. **Ethernet_Other_Commit_Desc**

Paragraph 70, Variable Identifier 1(iv): "Where applicable, provide narrative description of the types of other TDM business data services referenced in Ethernet_Other_Commit and a description of how Ethernet services may be used to count towards this percentage commitment."

Not applicable. The AT&T tariff pricing plans under investigation do not permit Ethernet services to be counted toward the commitment levels.

[42] BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B).

[43] *Id*.

11. **Citations_FT_DS1**

Paragraph 70, Variable Identifier 2(i): "Where applicable, provide, using a searchable PDF or text format, the full text of all provisions in the tariff concerning how Ethernet purchases are eligible to count toward fulfillment of DS1 channel terminations percentage commitments (i.e., the product of the percentage commitment and the volume commitment), and include citations to those provisions."

Not applicable. The AT&T tariff pricing plans under investigation do not permit Ethernet services to be counted toward the commitment levels.

12. **Citations_FT_DS3**

Paragraph 70, Variable Identifier 2(ii): "Where applicable, provide, using a searchable PDF or text format, the full text of all provisions of the tariff concerning how Ethernet purchases are eligible to count toward fulfillment of DS3 channel terminations purchase commitments (i.e., the product of the percentage commitment and the volume commitment), and include the citations to those provisions."

Not applicable. The AT&T tariff pricing plans under investigation do not apply to DS3 services.

13. **Citations_FT_Other**

Paragraph 70, Variable Identifier 2(iii): "Where applicable, provide using a searchable PDF or text format, the full text of all provisions in the tariff concerning how Ethernet purchases are eligible to count toward fulfillment of purchase commitments (i.e., the product of the percentage commitment and the volume commitment), other than DS1 and DS3 channel terminations purchase commitments, and include citations to those provisions."

Not applicable. The AT&T tariff pricing plans under investigation do not permit Ethernet services to be counted toward the commitment levels.

14. **Citations_Other_Desc**

Paragraph 70, Variable Identifier 2(iv): "Where applicable, provide narrative description of the types of other TDM business data services, other than DS1 channel terminations and DS3 channel terminations, whose percentage commitment may be fulfilled by Ethernet purchases."

Not applicable. The AT&T tariff pricing plans under investigation do not permit Ethernet services to be counted toward the commitment levels.

15. **Business_Reason_Ethernet_Limit**

Paragraph 70, Variable Identifier 3: "Provide a narrative description of the business rationale for each provision, condition, qualification, or limitation on technology migration, such as limitations on the counting of Ethernet purchases toward the fulfillment of applicable percentage commitments."

As explained above, these tariffs were implemented between 12 and 22 years ago, long before migration from the DS1 services offered under these tariffs was an issue. As a result, these tariffs simply do not address Ethernet services. However, as explained in the accompanying declaration of Paul Reid, customers have negotiated contracts (pricing flexibility/broadband services) that waive or credit early termination penalties and shortfall charges that might otherwise apply when they migrate to Ethernet services.[44] AT&T has also implemented terms in its Guidebook that permit customer to waive early termination liability for services that are migrated to AT&T Ethernet services.

16. **Citation_FT_UPT**

Paragraph 81, Variable Identifier 2: "If the tariff pricing plan has an upper percentage threshold, then provide the full text (which may be a searchable PDF) and a citation to the section number of the tariff pricing plan containing the upper percentage threshold provision."

A. **Tariff Citations**

The upper limit threshold can be found in the following tariffs at the cited locations:

- Ameritech Operating Companies Tariff F.C.C. No. 2, § 7.4.13(B);
- Pacific Bell Telephone Company Tariff F.C.C. No. 1, § 7.4.18(E)(4); and
- Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 7.2.22(E)(4).

The ACP in BellSouth Telecommunications Tariff F.C.C. No. 1, § 2.4.8(B) has no upper percentage threshold.

B. **Tariff Language**

Pursuant to the instructions for Table I, the full text of the tariff provisions cited above is being provided separately in a searchable PDF file entitled "AT&T Tariff Excerpts." An electronic version of this PDF file is included on the CD accompanying AT&T's Direct Case; a printed copy of this file is being provided as Attachment 6 to AT&T's Direct Case.

17. **Overage_Pct_Thrs_Other_Desc**

Paragraph 81, Variable Identifier 3(iv): "If applicable, provide a narrative description of the other TDM business data services to which the Overage_Percent_Threshold_Other applies, including the type of business data services, how they are denominated, the relevant units of measure, and how each type of business data services counts toward the overage calculation."

Not applicable.

18. **Citation_FT_Auto_Incr_Overage**

Paragraph 81, Variable Identifier 5: "If the pricing plan requires an automatic increase of the volume commitment of a purchaser that exceeds an upper percentage threshold, provide the full

[44] *See, e.g.*, Declaration of Paul Reid ¶ 81.

text of the provision (which may be a searchable PDF) and a citation to the relevant section of the pricing plan."

Not applicable.

TABLE II.A NARRATIVE RESPONSES

1. **Discount_Quant_Other_Desc**

Variable Identifier 5(iv): "Provide a narrative explanation of the types of all other TDM business data services included in Discount_Quant_Other, how these are denominated, and the relevant units of measure."

The types of TDM business data services included in the Discount_Quant_Other category are (1) Channel Mileage – Per Mile (measured in miles); (2) Channel Mileage – Fixed (measured as a single fee for a fixed amount of mileage); and (3) Multiplexing (measured in multiplexing slots).[45] These are listed separately in Table II.A.

[45] In Table II.A, these services are referred to by different names depending on the region. For the Ameritech Region, the entries for "Channel Mileage" correspond to "Channel Mileage – Per Mile," and the entries for "Channel Mileage Termination" correspond to "Channel Mileage – Fixed."

TABLE II.B NARRATIVE RESPONSES

1. **Undiscounted_Quant_Other_Desc**

Variable Identifier 3(iv): "Provide a narrative explanation of the types of all other TDM business data services included in Undiscounted_Quant_Other, how these are denominated, and the relevant units of measure."

The types of TDM business data services included in the Undiscounted_Quant_Other category are (1) Channel Mileage (measured in miles); (2) Channel Mileage – Fixed (measured as a single fee for a fixed amount of mileage); and Multiplexing (measured in multiplexing slots). These are listed separately in Table II.B. In Table II.B, these services are referred to by different names depending on the region. The entries corresponding to Channel Mileage (per mile) are: (1) DS1 Channel Mileage (Ameritech); (2) DS1 Channel Mileage – InterOffice Mileage (Pacific Bell and Southwestern Bell); (3) DS1 InterOffice Channel – Per Mile (BellSouth); (4) DS3 Channel Mileage (Ameritech); (5) DS3 Channel Mileage – InterOffice Mileage (Pacific Bell and Southwestern Bell); and (6) DS3 InterOffice Channel – Per Mile (BellSouth). The entries corresponding to Channel Mileage – Fixed are: (1) DS1 Channel Mileage – Fixed (Pacific Bell and Southwestern Bell); (2) DS1 Channel Mileage Termination (Ameritech); (3) DS1 InterOffice Channel – Fixed (BellSouth); (4) DS3 Channel Mileage – Fixed (Pacific Bell and Southwestern Bell); (5) DS3 Channel Mileage Termination (Ameritech); and (6) DS3 InterOffice Channel – Fixed (BellSouth). The entries corresponding to Multiplexing are: (1) DS1 Interface (DS1 to DS0) (BellSouth); (2) DS1 Multiplexing (DS1 to VG) (Ameritech); (3) DS1 Multiplexing (DDS1 to VG/DIG) (Pacific Bell and Southwestern Bell); (4) DS3 Interface (DS3 to DS1) (BellSouth); and (5) DS3 Multiplexing (DS1 to DS3) (Ameritech, Pacific Bell, and Southwestern Bell).

TABLE III NARRATIVE RESPONSES

1. **Volume_Cmt_Other_Expl**

Paragraph 64, Variable Identifier 1(iv): "Where applicable, provide narrative description of the types of business data services specified in Volume_Commit_Other, including a description of how the commitment is denominated and the relevant units of measure."

The types of TDM business data services included in the Volume_Commit_Other category are (1) Interoffice Transport (measured in miles); and (2) DS1 Multiplexing (measured in multiplexing slots). These are listed separately in Table III.

2. **Basis_Volume_Commit_Expl**

Paragraph 64, Variable Identifier 2(ii): "If Basis_Volume_Commit was set to 0, then provide narrative explanation of the basis for setting the volume commitment, including the date for which the quantity of business data service previously purchased may have been used to set the volume commitment."

Under the Bellsouth ACP, the customer chooses the commitment level.[46] It is not set based on the quantity of the customer purchases on the start date. Rather, the commitment level is set at the number of services the customer chose to place in the ACP as of the start date.

Under the Ameritech DCP, the commitment level is set based on the number of in-service DS1s.[47] In practice, this number of in-service DS1s is set based on the purchases in the month prior to the start of the DCP agreement. In addition, the commitment level does not include all in-service DS1s. It excludes those purchased under AT&T's Optional Payment Plan, which is a term plan offered in the Ameritech region, which is not subject to this investigation.

Under the DS1 TPP in the Southwestern Bell and Pacific Bell regions, customers may choose the portability feature.[48] If they choose that feature, the commitment level is set based on the number of all channel terminations purchased by the customer on the first day of the month immediately prior to the month in which the portability commitment is signed.[49]

3. **Basis_Change_Expl**

Paragraph 64, Variable Identifier 3: "Where applicable, provide a narrative description of any change in policy during 2012 through 2014, regarding the basis for setting volume commitments.

[46] BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B).

[47] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B).

[48] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E).

[49] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(1); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(1).

Provide a detailed explanation for how the policy changed and the business justification for the change.”

Not applicable.

TABLE IV NARRATIVE RESPONSES

1. **Successor_Vol_Cmt_Other_Expl**

Variable Identifier 5(iv): "Where applicable, provide narrative explanation of all other TDM business data services reported in Successor_Vol_Commit_Other, including a description of how these services are denominated and the relevant units of measure."

The types of TDM business data services included in the Successor_Vol_Commit_Other category are (1) Interoffice Transport (measured in miles); and (2) DS1 Multiplexing (measured in multiplexing slots). These are listed separately in Table IV.

2. **Predecessor_Vol_Commit_Other_Desc**

Variable Identifier 6(iv): "Where applicable, provide a narrative explanation of all other TDM business data services reported in Predecessor_Vol_Commit_Other, including a description of how these services are denominated and the relevant units of measure."

The types of TDM business data services included in the Predecessor_Vol_Commit_ Other category are (1) Interoffice Transport (measured in miles); and (2) DS1 Multiplexing (measured in multiplexing slots). These are listed separately in Table IV.

3. **Predecessor_End_Cmt_Other_Expl**

Variable Identifier 7(iv): "If applicable, provide a narrative explanation of all other TDM business data services reported in Predecessor_End_Commit_Other, including a description of how these services are denominated and the relevant units of measure on a monthly basis."

The types of TDM business data services included in the Predecessor_End_Commit_ Other category are (1) Interoffice Transport (measured in miles); and (2) multiplexing (measured in multiplexing slots). These are listed separately in Table IV.

TABLE V NARRATIVE RESPONSES

1. **Service_Bundle_DS1**

Variable Identifier 6(ii): "Narrative description of the type, number, and capacity of Ethernet services sold that offset the DS1 channel termination percentage commitments as reported in Ethernet_Counted_DS1, how those Ethernet services were denominated and the relevant units of measure."

Not applicable. The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments.

2. **Service_Bundle_DS3**

Variable Identifier 6(iv): "Narrative description of the type, number, and capacity of Ethernet services sold that offset the DS3 channel termination percentage commitments as reported in Ethernet_Counted_DS3, how those Ethernet services were denominated and the relevant units of measure."

Not applicable. The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments.

3. **Service_Bundle_Other**

Variable Identifier 6(vi): "Where applicable, provide narrative description of the type, number, and capacity of Ethernet services sold that offset the other TDM business data services percentage commitments as reported in Ethernet_Counted_Other."

Not applicable. The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments.

4. **Ethernet_Rev_Ctd_Other_Expl**

Variable Identifier 7(iv): "If applicable, and if not already provided above, provide narrative description of the other TDM business data services whose percentage commitment was offset by Ethernet purchases as reported in Ethernet_Rev_Counted_Other.""

Not applicable. The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments.

5. **TDM_Offset_Other_Expl**

Variable Identifier 8(iv): "If applicable, and if not already provided above, provide narrative description of the other TDM business data services which were offset by Ethernet purchases as reported in TDM_Offset_Other, including the types of business data services, who they are denominated, and the relevant units of measure."

Not applicable. The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments.

6. **TDM_Offset_Rev_Other_Expl**

Variable Identifier 9(iv): "If applicable, and if not already provided above, provide a narrative description of the other TDM business data services whose percentage commitment was offset by Ethernet purchases as reported in TDM_Offset_Rev_Other, including the types of business data services, how they are denominated, and the relevant units of measure."

Not applicable. The AT&T pricing plans under investigation do not count Ethernet purchases towards percentage commitments.

TABLE VI NARRATIVE RESPONSES

1. **New_Volume_Commitment_Oth_Expl**

Variable Identifier 7(iv): "Where applicable, provide a narrative description of New_Volume_Commitment_Other, including a description of the type of business data services included, how these business data services are denominated, and the relevant units of measure."

The types of TDM business data services included in the New_Volume_Commitment_Other category are (1) Interoffice Transport (measured in miles); and (2) DS1 Multiplexing (measured in multiplexing slots). These services are identified separately in Table VI.

2. **Shortfall_Penalty_Desc**

Variable Identifier 8(ii): "Narrative description of how the shortfall penalty was calculated for this shortfall."

A. **DCP (Ameritech)**

If the customer's actual in-service level falls below the commitment level, the customer is billed for the commitment level of local distribution channels ("LDCs") at the DCP rates.[50] For example, a customer that commits 90 LDCs but has only 70 LDCs in service will be billed at the DCP rates for 90 LDCs.[51] Where a customer falls below the commitment level, AT&T notifies the customer that it has up to 90 days to correct the shortfall. So long the customer's in-service levels return to the commitment level within this time, the customer is not required to pay a shortfall penalty.[52] This 90-day cure period is intended to protect customers from being penalized due to aberrations in LDC counts caused by timing differences in disconnections and installation.[53]

B. **ACP (BellSouth)**

If the number of in-service DS1s is less than the commitment level, the customer is billed a shortfall charge that is equal to the difference between the customer's commitment level and the number of in-service rate elements of the relevant type (*e.g.*, local channel, multiplexer, or channel mileage), multiplied by 50 percent of the ACP rate applicable to each rate element to which the shortfall charge applies.[54] The ACP rate used for this calculation is the ACP Plan B, Price Cap Zone 2 rate that is in effect on the billing date for the appropriate commitment period.[55]

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[50] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B).

[51] *See id.*

[52] *See id.* § 7.4.13(C).

[53] *See id.*

[54] BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B).

[55] *See id.*

C. **DS1 TPP (Pacific Bell and Southwestern Bell)**

If the customer's total number of channel terminations falls below 80 percent of the commitment level, the customer is billed the difference between 80 percent of the commitment level and the actual number of in-service channel terminations.[56] For example, if a customer had a commitment level of 1,000 DS1 channel terminations, the customer must maintain at least 800 DS1 channel terminations (*i.e.*, 80 percent of the commitment level) to avoid a penalty. If the customer's in-service DS1 channel terminations drop to 795, the customer would be billed an amount equal to five channel terminations multiplied by the current nonrecurring channel termination rate. The shortfall charge continues to apply until the customer's in-service number of DS1s reaches 80 percent of the commitment level.[57]

3. **Shortfall_Other_Desc**

Variable Identifier 9(iv): "Where applicable, provide a narrative description of the shortfall of all other TDM business data services, including the types of business data services involved, how these services are denominated, and the relevant units of measure."

The only AT&T tariff pricing plan under investigation that has shortfall charges for other types of business services is the BellSouth ACP. The types of TDM business data services included in the Shortfall_Other category are (1) Interoffice Transport (measured in miles); and (2) DS1 Multiplexing (measured in multiplexing slots). These services are identified separately in Table VI.

[56] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(b); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(b).

[57] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(b); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(b).

TABLE VII NARRATIVE RESPONSES

1. **Upper_Pct_Threshold**

Variable Identifier 7: "The upper percentage threshold associated with the pricing plan. If there are multiple upper percentage thresholds in the relevant agreement, specify the upper percentage threshold relevant to this overage occurrence."

The upper percentage threshold for the DS1 TPP (Pacific Bell and Southwestern Bell) is 124 percent of the commitment level.[58] The upper percentage threshold for the DCP (Ameritech) is 130 percent of the initial in-service level for three-year plans, and 150 percent of the initial in-service level for five-year plans.[59] The ACP (BellSouth) does not have an upper percentage threshold; the customer chooses the commitment level under this plan.[60]

2. **Overage_Penalty_Desc**

Variable Identifier 8(ii): "Provide a narrative description of how Overage_Penalty was calculated for this overage occurrence, including a description of the inputs, how these inputs are denominated and the relevant units of measure, as well as the calculation used."

The overage penalties under the DS1 TPP (Pacific Bell and Southwestern Bell) are calculated by multiplying the total number of DS1 channel terminations in excess of 124 percent of the commitment level by the nonrecurring channel termination rate.[61] Under the DCP (Ameritech), the customer is billed at the month-to-month rates, rather than the DCP rates, for all circuits above the commitment level if the customer's in-service level goes above the upper threshold (*i.e.*, 130 percent of the commitment level for three-year terms; 150 percent of the commitment for five-year terms).[62] The ACP (BellSouth) does not have overage penalties; the customer chooses the commitment level under this plan.[63]

3. **Overage_Other_Expl**

Variable Identifier 9(iv): "Where applicable, provide a narrative explanation of how Overage_Other was calculated, including a description of the type of all other TDM business data services included, how these are denominated, and the relevant units of measure."

Not applicable.

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[58] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(c).

[59] Ameritech Operating Company, Tariff F.C.C. No. 2, § 7.4.13(B).

[60] BellSouth Telecommunications, Tariff F.C.C. No. § 2.4.8(B).

[61] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(E)(4)(c); Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(E)(4)(c).

[62] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(B).

[63] BellSouth Telecommunications, Tariff F.C.C. No. § 2.4.8(B).

4. **Overage_Rev_Other_Expl**

Variable Identifier 10(iv): "Where applicable, and if not already included in (9) (iv) above, provide a narrative explanation of how Overage_Rev_Other was calculated, including a description of the type of other TDM business data services included, how these are denominated, and the relevant units of measure."

Not applicable.

5. **Volume_Increase_Other_Expl**

Variable Identifier 12(iv): "Where applicable, provide a narrative explanation of how Volume_Increase_Other was calculated, including a description of the type of other TDM business data services included, how these are denominated, and the relevant units of measure."

Not applicable.

6. **Overage_Resolution**

Variable Identifier 16: "In instances where an overage penalty was not actually paid, provide a narrative description of how it was ultimately resolved."

[BEGIN HIGHLY CONFIDENTIAL] [redacted] **[END HIGHLY CONFIDENTIAL]**

TABLE VIII NARRATIVE RESPONSES

1. **Cite_FT_Term_Discount**

Variable Identifier 3: "A citation to the section of the tariff pricing plan that describes the term discounts. In addition, provide full text (or text-searchable PDF) of this section of the tariff pricing plan."

A. **Tariff Citations**

The sections of the pricing plans that include and describe the plan's term discounts can be found in the following tariffs at the cited locations:

- Ameritech Operating Companies Tariff F.C.C. No. 2, § 7.4.13(A);
- BellSouth Telecommunications Tariff F.C.C. No. 1, § 2.4.8(B);
- Pacific Bell Telephone Company Tariff F.C.C. No. 1, §§ 7.4.18 and 31.5.2.7.1(C); and
- Southwestern Bell Telephone Company Tariff F.C.C. No. 73, §§ 7.2.22. and 39.5.2.7.1(E).

B. **Tariff Language**

Pursuant to the instructions for Table VIII, the full text of the tariff provisions cited above is being provided separately in a searchable PDF file entitled "AT&T Tariff Excerpts." An electronic version of this PDF file is included on the CD accompanying AT&T's Direct Case; a printed copy of this file is being provided as Attachment 6 to AT&T's Direct Case.

TABLE IX NARRATIVE RESPONSES

1. **Termination_Fee_Desc**

Variable Identifier 4(ii): "Narrative explanation of how termination fee was calculated, e.g., the number of circuit(s) that were terminated before the end date of the agreement, the number of months by which the termination date preceded the end date, and any additional factors used in calculating the termination fee." The *Designation Order*, footnote 266, identifies the specific tariff provisions for which information should be reported.

Early termination fees do not apply under the Ameritech DCP and BellSouth ACP because they are portability plans. Instead, customers can "buy down" their commitment level under these plans, and these buy down amounts are referred to as early termination liability.[64] Accordingly, the table identifies any such buy down amounts. Under the PacBell and Southwestern Bell DS1 TPPs, customers can choose a pure term plan (*i.e.*, without portability) that contains early termination liability, and the table identifies those amounts. The methods by which the buy down fee is calculated in each region are discussed below.

A. **Ameritech DCP**

Under the Ameritech DCP, a customer can decrease its commitment level by paying termination liability charges on the number of local distribution channels (LDCs) by which the commitment level is decreased.[65] For example, if a customer had a commitment level of 90 LDCs, and the customer decreased the commitment level to 70 LDCs, the customer would pay a termination liability on 20 LDCs.[66]

For LDCs in service for less than 36 months, the termination liability is equal to the number of LDCs by which the customer reduced its commitment, multiplied by (1) the number of months the LDCs were in service; and (2) the difference between the month-to-month rate and the customer's DCP rate.[67]

For LDCs in service for 36 months or more, the early termination liability is equal to the number of LDCs by which the customer reduced its commitment, multiplied by (1) the number of months the LDCs were in service; and (2) the difference between the current DCP rate for the term that could have been completed and the customer's DCP rate.[68]

For example, if a customer subscribing to a 60-month DCP term reduced its commitment level by 20 LDCs during the 37th month of service, the customer's early termination charge would be equal to:

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[64] *See* Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(E); BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B).

[65] Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13(E).

[66] *Id.*

[67] *See id.*

[68] *See id.*

20 LDCs x 37 months x [(the 36-month DCP rate) – (the 60-month DCP rate)].

Early termination liability does not apply to individual LDCs that are disconnected or moved within a state as long as the commitment level is maintained.[69]

B. Pacific Bell DS1 TPP

Under the PacBell DS1 TPP, the early termination liability is equal to the monthly recurring rate for the service multiplied by (1) the months remaining in the DS1 TPP term at the time of termination; and (2) 40%.[70] For example, if a customer with a $500 monthly rate terminates service with 10 months remaining in a 3-year DS1 TPP term, the termination liability charge would be:

($500/month) x (10 months) x (0.40) = $2,000

In addition, if the service is terminated after less than one month, an additional fee can apply.[71]

C. Southwestern Bell DS1 TPP

Under the Southwestern Bell DS1 TPP, the early termination liability is equal to the monthly recurring rate for the service multiplied by (1) the months remaining in the DS1 TPP term at the time of termination; and (2) 40%.[72] For example, if a customer with a $500 monthly rate terminates service with 10 months remaining in a 3-year DS1 TPP term, the termination liability charge would be:

($500/month) x (10 months) x (0.40) = $2,000

In addition, if the service is terminated after less than one month, an additional fee can apply.[73]

D. BellSouth ACP

Under the BellSouth ACP, the buy down fee is equal to the ACP rate under the existing agreement multiplied by the difference in months between the time the ACP agreement has been in effect and the minimal months for the type of agreement (i.e., 24 months for Plan A and 49 months for Plan B) of the existing agreement times a factor (i.e., 20 percent for agreements that have been in effect for longer than 12 months or 40 percent for agreements that have been in effect for 12 months or less).[74]

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[69] *Id*.

[70] Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 7.4.18(G)(2).

[71] *See id*. § 5.2.6 (describing termination liability where service is terminated prior to the "minimum service period and setting the minimum service period for most services at one month).

[72] Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 7.2.22(G)(2).

[73] *See id*. § 7.2.22(G)(1) (describing termination liability where services is terminated prior to the "minimum service period); *id*. § 7.2.8 (setting the minimum service period for most services at one month).

[74] BellSouth Telecommunications Tariff F.C.C. No. 1, § 2.4.8(B).

2. **Not_Maintained_Other_Expl**

Variable Identifier 6(iv): "Where applicable, provide a narrative explanation of how Not_Maintained_Other was calculated, including a description of the types of other TDM business data services involved, how each service is denominated, and the relevant units of measure."

Not applicable.

3. **Rev_Not_Maintained_Other_Expl**

Variable Identifier 7(iv): "Where applicable, provide narrative explanation of how Rev_Not_Maintained_Other is defined, including the types of services, how each service is denominated, and the relevant units of measure."

Not applicable.

ATTACHMENT 5

ATTACHMENT 5.A

Copies of the agreements required under Paragraph 105 of the *Designation Order* are being provided in the CD accompanying AT&T's Direct Case.

ATTACHMENT 5.B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

DESCRIPTION OF BROADBAND SERVICES AGREEMENTS

January 8, 2016

Description of Broadband Services Agreements

Paragraph 105 of the *Designation Order* directs the incumbent local exchange carriers (ILECs) to submit all special access agreements with competitive local exchange carriers (CLECs) that include tariffed special access services, the rates or terms of which impact, directly or indirectly, the rates paid for special access services.[1] Specifically, the *Designation Order* directs ILECs to "identify all instances in which the amounts of any such benefits or credits approximate the amount a purchaser would otherwise have to pay in non-recurring charges or in circuit termination penalties under a tariff."[2]

AT&T has responsive Broadband Services Agreements (BSAs) with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Relevant sections of these BSA are discussed below.

1. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

2. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

3. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[1] Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, *Order Initiating Investigation and Designating Issues for Investigation*, WC Docket No. 15-247, ¶ 105 (Oct. 16, 2015) (the *Designation Order*).

[2] *Id.*

[3] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[4] *Id.* § 4.8.1 (ATT00009-10).

[5] *Id.* § 4.4 (ATT00007).

[6] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[7] *Id.* § 2.2 (ATT00132-33).

[redacted] **[END HIGHLY CONFIDENTIAL]**

4. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

5. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[8] Pacific Bell Telephone Company Tariff F.C.C. No. 1 DS1 Term Payment Plan (PacBell DS1 TPP), § 7.4.18.

[9] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, DS1 Term Payment Plan (SWBT DS1 TPP), § 7.2.22.

[10] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[11] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id.* § 5.11.2.3 (ATT00152-53). **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id.*

[12] *Id.* §§ 5.11.2.1, 5.11.3.2 (ATT00152-53).

[13] *Id.* §§ 5.22.2.2, 5.11.3.3 (ATT00152-53).

[14] *Id.* §§ 5.11.2.3, 5.11.3.1 (ATT00152-53). **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id.* § 5.11.2.3 (ATT00152-53). **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id.* § 5.11.3.1 (ATT00153).

[15] *Id.* § 5.12 (ATT00153-54).

[16] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[17] *Id.* § 3.1.2 (ATT00163).

[18] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[19] *Id.* **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id.* §§ 2.1, 2.2.

[redacted] [END HIGHLY CONFIDENTIAL]

6. [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[BEGIN HIGHLY CONFIDENTIAL] [redacted]

[20] *Id.* § 6.5 (ATT00173-74).

[21] *Id.*

[22] *Id.* §§ 2.4.1, 2.4.3 (ATT00169-70).

[23] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[24] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[25] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[26] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[27] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[28] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[29] [BEGIN HIGHLY CONFIDENTIAL] [redacted] [END HIGHLY CONFIDENTIAL]

[redacted] **[END HIGHLY CONFIDENTIAL]**

7. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

8. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[30] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[35] *Id.* § 2.

[36] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]**

[37] *Id.* § 5.19.1(i)(A) (ATT00437).

[38] *Id.* § 5.19.1(i)(B) (ATT00437).

[39] *Id.* § 5.19.1(i)(C) (ATT00437).

[40] *Id.* § 5.19.1(i)(D) (ATT00437).

[41] *Id.* § 5.19.1(ii) (ATT00437-38).

[42] *Id.* § 5.19 (ATT00437).

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9. [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

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[44] [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[45] [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[46] *Id.*

[47] *Id.*

[48] *Id.* § 5.14 (ATT00697).

[49] *Id.* §§ 5.10, 5.10.1 (ATT00689-94).

[50] *Id.* § 5.11 (ATT00695-96).

ATTACHMENT 6

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247

AT&T TARIFF EXCERPTS

January 8, 2016

Ameritech Operating Companies

Discount Commitment Program (DCP)

Tariff F.C.C. No. 2, § 7.4.13

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.13 Discount Commitment Program (DCP) *

(A) General Description

The Discount Commitment Program (DCP) provides the customer with rate stabilization and discounted rates for Direct Analog, Base Rate and DS1 services (described in Sections 7.2.3 and 7.2.9, preceding), except the DCP is not available for DS1 Local Distribution Channels (LDC) associated with 128, 256, 384, 512, and 768 Kbps Channel Mileage Termination and Channel Mileage, installed after October 2, 2000. The customer agrees to a minimum service commitment per service per state when establishing a DCP. Customers may disconnect or move Local Distribution Channels within the state and not be subject to Termination Liability charges as long as commitment levels are maintained.

DCPs may be established by service by state and be of either 3 or 5 years duration. A customer may have only one DCP per service per state in effect at one time. For example, a customer that has a 3 year DCP for Direct Analog service in Illinois may not establish a second Direct Analog DCP in Illinois until the current DCP expires. (Tx)

Monthly rates for services installed under a DCP will change as Telephone Company initiated rate changes become effective but during the DCP term will not exceed the monthly rate in effect at the beginning of the customer's DCP term. During the term of the selected DCP, Telephone Company initiated rate changes (increases or decreases) will automatically be applied to the monthly rates for the remaining months of the current DCP term. But in no case will any rate change cause the monthly rate during the DCP term to exceed that in effect at the beginning of the customer's DCP term.

(B) Commitment Level

A customer establishes a DCP term by committing 90 percent or more of their in service Local Distribution Channels to a term of either 3 or 5 years duration. Although the commitment is based upon Local Distribution Channels, the following rate elements will all receive DCP rates: (Tx)

Channel Mileage
Channel Mileage Termination
DS1 to Voice/Base Rate Multiplexer
Local Distribution Channel

* DCP is not available for DS1 Local Distribution Channels (LDC) associated with 128, 256 384, 512, and 768 Kbps Channel Mileage Termination and Channel Mileage, installed after October 2, 2000.

(Tx)
(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 1803 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.13 Discount Commitment Program (DCP) (Cont'd) *

(B) Commitment Level (Cont'd)

Only rate elements not purchased under an Optional Payment Plan (described in Section 7.4.9) will be eligible for inclusion in the commitment level and for DCP rates.

As long as a customer's actual in service level of Local Distribution Channels is at the commitment level, customers will be billed DCP rate for all eligible rate elements. Additionally, if a customer's in service level exceeds the initial in service level by no more than 30 percent for a three year DCP or 50 percent for a 5 year DCP, customers will be billed the DCP rates for all eligible rate elements. For example, a customer with 100 Base Rate LDCs commits 90 LDCs (or 90 percent) to a 3 year DCP term. The customer will be billed DCP rates as long as the actual in service level of Base Rate LDCs is greater than or equal to 90 or less than 130.

If a customer's in service level exceeds the initial in service level by more than 30 percent for a three year term or 50 percent for a 5 year term, the customer will be billed the monthly rate for all LDCs above the commitment level. For example, a customer with 100 Base Rate LDCs that commits 90 (or 90 percent) LDCs to a 3 year DCP actually has 140 LDCs in service. This customer will be billed DCP rates for 90 LDCs but monthly rates for the 50 LDCs above the commitment level.

If a customer's actual in service level falls below the commitment level, the customer will be billed for the commitment level of LDCs at DCP rates. For example, a customer that commits 90 LDCs but only has 70 LDCs in service will be billed the DCP rates for 90 LDCs.

In all cases, applicable associated rate elements (excluding the LDCs) for the service covered by a DCP term, will receive DCP rates even when the actual in service level of Local Distribution Channels is outside the DCP parameters, as described above.

* DCP is not available for DS1 Local Distribution Channels (LDC) associated with 128, 256, 384, 512, and 768 Kbps Channel Mileage Termination and Channel Mileage, installed after October 2, 2000.

(N)

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.13 Discount Commitment Program (DCP) (Cont'd) *

(C) 90 Day Review Period

No adjustments, for being above or below commitment level (as described in (B) above), in monthly billing for a DCP will take place until 90 days after Telephone Company notification to the customer that the commitment level has been exceeded or not been met. This will insure that customers will not be penalized for aberrations in Local Distribution Channel counts caused by timing differentials in disconnection and installation.

Customers' bills will not be adjusted for being outside the parameters described in 7.4.13(B), preceding during the 90 day review period. Additionally, customers will continue to be billed the adjustments (following the 90 day review period) for being outside the described parameters until the commitment level is met or increased. A new 90 day review period will be initiated if the customer's actual in service level subsequently falls outside the described parameters.

(D) Increasing the DCP Commitment Level

Customers may increase their commitment level at any time by notifying the Telephone Company in writing. An increase in the commitment level will not change the expiration date of the DCP.

When a commitment level is increased, the actual in service LDC level at the time of the increase will be used to calculate billing adjustments as described in Section 7.4.13(B), preceding.

(E) Decreasing the DCP Commitment Level and Termination Liabilities

Customers may only decrease their commitment level by paying termination liability charges on the number of Local Distribution Channels by which the commitment level is decreased. Termination Liabilities will apply to Direct Analog, OPTINET Base Rate and DS1 services covered by a DCP. For example, a customer has a commitment level of 90 LDCs. The customer then decreases this commitment level to 70 LDCs. The customer must pay termination liabilities on 20 LDCs.

* DCP is not available for DS1 Local Distribution Channels (LDC) associated with 128, 256, 384, 512, and 768 Kbps Channel Mileage Termination and Channel Mileage, installed after October 2, 2000.

(N)

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.13 Discount Commitment Program (DCP) (Cont'd) *

(E) Decreasing the DCP Commitment Level and Termination Liabilities (Cont'd)

The Termination Liability for DCP is calculated to be the dollar difference between the current DCP rate for the DCP term that could have been completed during the time the service was actually in service, or the monthly rate for services in place less than 36 months, and the customer's current DCP rate for each month the service was provided.

For example, a customer subscribing to a 60 month DCP term reduced their LDC commitment by 20 LDCs during the 37th month. This customer's termination charge would be:

20 LDCs x (36 month DCP rate - 60 month DCP rate) x 37 months
= Termination Charge

Termination Liability charges will not apply to individual Local Distribution Channels disconnected or moved within a state as long as the commitment level is maintained. Normal nonrecurring charges will apply.

A decrease in the commitment level will not change the expiration date of the DCP.

(F) Upgrading a DCP Service

When a customer upgrades a Direct Analog or Base Rate service being billed DCP rates to an DS1 service, the Direct Analog or Base Rate DCP commitment level will be reduced at the customer's request (up to a maximum of 24) and no termination liabilities will apply. If the customer has a DCP for DS1, the DS1 DCP commitment level will be increased if the customer requests that it be increased. When a customer upgrades a DS1 service being billed DCP rates to a higher speed service with the same termination points, the customer's DS1 DCP commitment level will be reduced at the customer's request and no termination liabilities will apply. (C) (C)

* DCP is not available for DS1 Local Distribution Channels (LDC) associated with 128, 256, 384, 512, and 768 Kbps Channel Mileage Termination and Channel Mileage, installed after October 2, 2000.

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.13 Discount Commitment Program (DCP) (Cont'd) *

(G) Conversion to an Optional Payment Plan (OPP)

Customers may convert services from a DCP term to an OPP as described in 7.4.10, preceding. No termination liabilities will apply to services converted to an OPP term of the same or longer length than the DCP term. Additionally, the customer's DCP commitment level will be reduced by the number of LDCs, associated with the service, converted to an OPP term. (Tx)

* DCP is not available for DS1 Local Distribution Channels (LDC) associated with 128, 256, 384, 512, and 768 Kbps Channel Mileage Termination and Channel Mileage, installed after October 2, 2000.

(Tx)
(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 1803 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

(This page filed under Transmittal No. 1806)

BellSouth Telecommunications

Area Commitment Plan (ACP)

Tariff F.C.C. No. 1, § 2.4.8(B)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.8 Optional Payment Plans (Cont'd)

(A) Channel Services Payment Plan (Cont'd)

(9) Prepayment (Cont'd)

(b) (Cont'd)

- When a customer who has prepaid recurring monthly rates replaces the existing CSPP arrangement with a new CSPP arrangement, the customer will be credited with that portion of the prepayment amount, representing a prepayment of the monthly recurring rates remaining in the existing CSPP arrangement.

- Customers who prematurely disconnect will have termination liability charges deducted from the unused prepaid balance. The remaining prepaid balance, if any, will be credited to their bill.

(B) Area Commitment Plan (ACP)

The Area Commitment Plan (ACP) allows customers who have obtained service on a month-to-month basis to receive reduced rates, in the form of ACP credits,in exchange for a commitment to maintain a level of service for a specified period of time. The terms of this plan apply to special access services or switched access services that are available under an ACP, except as noted in the rate regulations for a service.

Services included in a Channel Services Payment Plan (CSPP) and/or a Transport Payment Plan (TPP) may not be included in an ACP or vice versa.

The customer determines the commitment level of rate elements that will be included in an ACP, i.e., the customer will provide the number of commitment rate elements expressed as a whole number (e.g., 12 DS1 Local Channels). For example, a customer wishes to establish an ACP for all of his DS1 services that are billing on a month-to-month basis. The customer has 12 DS1 Local Channels and 6 DS1 Interoffice Channels that have a total of 90 Interoffice Channel miles. In this example, the quantity of commitment rate elements would be specified as 12 DS1 Local Channels and 90 Interoffice Channel miles. For interoffice channels, the commitment is based on a quantity of miles. When credits are applied to interoffice channel miles on a circuit, the customer automatically receives credit for the fixed rate element component of the interoffice channel. As a further example, this customer may desire to establish a commitment level only for a small portion of these DS1 services. In this case, the customer would specify the level that is desired (e.g., 1 DS1 Local Channel). ACP commitments are made on a regional basis, i.e., one commitment for all Company service areas.

All BellSouth marks contained herein and as set forth in the trademarks and servicemarks section of this Tariff are owned by BellSouth Intellectual Property Corporation.

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.8 Optional Payment Plans (Cont'd)

(B) Area Commitment Plan (ACP) (Cont'd)

The Customer may choose any period of time between 24 and 72 months for the commitment.[1] The applicable rate for use in the ACP calculation is the ACP rate selected commitment period. ACP commitment periods are offered as follows: (T)

- ACP A, commitment periods may be selected from 24 months to 48 months in length.
- ACP B, commitment periods may be selected from 49 months to 72 months in length.[1]

Each month the Telephone Company will determine the number of in-service rate elements, by type (Local Channel, Multiplexer or Channel Mileage), for which the Telephone Company will apply credits during the following month. The amount of any ACP credit will be based on the difference between the month-to-month rate and the associated ACP rate. Credit and shortfall calculations will be performed at the end of each month, and the resulting credit/shortfall amounts will be applied to the Customer's bill during the following month. (C) (C) (C) (N)

The Telephone Company will apply credits to Local Channel and Multiplexer rate elements, by applying the following steps in the following order:

1. Credits will be applied by state, in proportion to the percentage of the relevant rate element type purchased by the Customer in each state. For example, if a Customer purchases 40 percent of its Local Channels in Florida, then the Telephone Company will apply 40 percent of the Customer's ACP credits to Local Channels to Florida.
2. Within each state, Local Channel and Multiplexer credits will be applied by Rate Zone, beginning with Rate Zone 1 and proceeding to Zone 3.
3. Within each Rate Zone, credits will be applied according to the applicable monthly charge for each rate element, beginning with the highest billed rate elements and proceeding to the lowest billed rate elements. (N)

[1] Effective May 15, 2015, Plan B commitment periods of 61 to 72 months will no longer be available. Plan B commitment periods from 49 to 60 months will continue to be available for new ACPs. There is no change for existing ACPs.

Some material that previously appeared on this page now appears on Original Page 89-1.

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.8 Optional Payment Plans (Cont'd)

(B) Area Commitment Plan (ACP) (Cont'd)

The Telephone Company will apply credits to mileage rate elements, by applying the following steps in the following order: (N)

1. Credits will be applied by state, in proportion to the percentage of the relevant rate element type purchased by the customer in each state. For example, if a Customer purchases 40 percent of its Local Channels in Florida, then the Telephone Company will apply 40 percent of the Customer's ACP credits to channel mileage in Florida.
2. Within each state, credits will be applied beginning with the longest mileage circuit and proceeding to the shortest mileage circuit.
3. If circuits have the same mileage, credits will be applied by Rate Zone, beginning with Rate Zone 1 and proceeding to Zone 3.
4. Within a Rate Zone, credits will be applied according to the applicable monthly charge for each mileage rate element, beginning with the highest billed rate element and proceeding to the lowest billed rate element. (N)

If the number of in-service rate elements is less than the commitment level, a shortfall charge will apply. The shortfall charge will be equal to the difference between the Customer's commitment level and the number of in-service rate elements of the relevant type (Local Channel, Multiplexer or Channel Mileage); multiplied by 50 percent of the ACP rate applicable to each rate element to which a shortfall charge is applied. To calculate shortfall charges, the Telephone Company will apply the ACP Plan B, Price Cap Zone 2 rate that is in effect on the billing date for the appropriate commitment period, i.e., the ACP rate that is effective at the end of each month for which the credit/shortfall calculations are performed. (C)

Some material appearing on this page previously appeared on 3rd Revised Page 89.

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.8 Optional Payment Plans (Cont'd)

(B) Area Commitment Plan (ACP) (Cont'd)

Services available under ACP and the ACP rates are specified in the rate regulations of the individual services.

Credit and shortfall amounts will be distributed to billing areas based on each billing area's portion of a Customer's regional ACP eligible in-service units. Each state in the region is considered to be one billing area. (Sy)

Effective March 4, 2006, a Customer may have only one ACP. For Customers with multiple ACP commitments prior to March 4, 2006, upon expiration of the multiple commitments, only one ACP may be maintained. In those cases as of March 4, 2006, where the Customer has more than one ACP agreement, the credits and shortfall charges will be determined in chronological order, starting with the earliest agreement. For Interoffice Mileage Commitments under ACP, circuits will be assigned with the longest mileage circuit assigned first and continuing in descending order by circuit length until the number of circuits subscribed to are assigned starting with the earliest agreement. (Sy) (Sy)

The Customer may add or disconnect services as desired, subject to the minimum service periods set forth in Section 7.4.4 for special access services or as set forth in Section 6.7.2 for switched access services and subject to applicable nonrecurring charges. Credits for services under an ACP will be made at the circuit level. (Sy) (Sy) (Sy)

(Dx)

(Dx)

(x) Issued under authority of Special Permission No. 15-017 of the FCC in order to withdraw material filed under Transmittal No. 106 without its becoming effective.

(y) Reissued material originally scheduled to become effective October 2, 2015.

All BellSouth marks contained herein and as set forth in the trademarks and service marks section of the BellSouth Tariffs are owned by BellSouth Intellectual Property Corporation.

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ACCESS SERVICE

2 - General Regulations (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.8 Optional Payment Plans (Cont'd)

(B) Area Commitment Plan (ACP) (Cont'd)

A customer may upgrade services under an ACP to a higher order of service[1], provided under an Optional Payment Plan (i.e., an ACP, a TPP, a FPSPP, a FSP or a CSPP arrangement) and request a reduction in his ACP commitment level without incurring a termination liability. The customer request for the services being upgraded from a lower order of service must be coordinated with the installation of the new service being upgraded to a higher order of service. A new ACP will be issued to reflect a new commitment level. The new commitment level must be equal to or greater than the current commitment level less the quantity of services upgraded.

Effective March 4, 2006, a customer desiring to increase a commitment level may update an existing ACP agreement to include the increased commitment level. The commitment period for the updated ACP agreement must be equal to or greater than the time remaining in the existing ACP agreement.

If during the commitment period, the customer desires to decrease its commitment level or period, the customer must enter into a new ACP agreement and terminate the existing ACP agreement(s). This will result in a termination liability to be calculated as follows:

The penalty for a decrease in the commitment level or commitment period, per unit decreased, will equal the ACP rate associated with the existing ACP agreement multiplied by the difference in months between the time the ACP agreement has been in effect and the minimal months of the existing agreement times a factor. The factor is 40 percent for agreements that have been in effect twelve months or less, or 20 percent for agreements that have been in effect longer than 12 months.

Changes in commitment periods within a plan (e.g., ACP B) do not constitute a change involving a termination liability.

In the case of a decrease in both a commitment level and commitment period, the termination liability will be calculated first for the reduction in level and then for the reduction in period based on the reduced level.

Note 1: Customer requested conversion of Special Access Service (a.k.a., BellSouth SPA) to the same or higher speed Fast Packet Access Service will be treated as an upgrade to a higher order of service.

All BellSouth marks contained herein and as set forth in the trademarks and servicemarks section of this Tariff are owned by BellSouth Intellectual Property Corporation.

Pacific Bell Telephone Company

DS1 Term Payment Plan (DS1 TPP)

Tariff F.C.C. No. 1, § 7.4.18

ACCESS SERVICE

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (DS1 TPP)

(A) General Description

The DS1 Term Payment Plan (DS1 TPP) is a term plan that allows a customer to purchase DS1 High Capacity Service over a 1, 2, 3, 5, or 7 year period. During the term of the selected DS1 TPP, Telephone Company initiated recurring rate changes (increases or decreases) will automatically be applied to the monthly payments for the remaining months of the current DS1 TPP term. The monthly recurring rate during the DS1 TPP term will never exceed the initial DS1 TPP rate. The DS1 TPP rates can be found in Section 7.5.9(I). (Tx)

The DS1 TPP cannot be combined with other tariffed services, discounts, or pricing flexibility contracts, unless explicitly stated in the respective tariff terms and conditions.

The following recurring rate elements are included in the DS1 TPP:

- DS1 High Capacity Service Channel Termination; refer to Section 7.2 for description
- DS1 High Capacity Service Channel Mileage - Fixed and Per Mile; refer to Section 7.2 for description
- DS1 High Capacity Service Central Office Multiplexing; refer to Section 7.2 for description
- DS1 High Capacity Service Collocation Transport (Fixed and Per Mile); refer to section 7.1 for a description. (Tx)

(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 498 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

(This page filed under Transmittal No. 501)

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(B) Conversion of service to a new DS1 TPP or Higher Speed Service

During a customer's DS1 TPP term, conversion may be made to a new DS1 TPP term of the same or different length or an upgrade may be made to a higher speed service, if the expiration date for the new DS1 TPP term or for the new higher service is beyond the expiration of the original DS1 TPP term. The new DS1 TPP term or higher speed service must occur between the same two termination points as the original DS1 service being converted. The new DS1 TPP term or the higher speed service term becomes effective upon completion of the conversion activity. The rates, terms, and conditions applicable for the new DS1 TPP term or higher speed service will be those in effect at the time the conversion is requested. Credit for months under the previous DS1 TPP may not be transferred to the new DS1 TPP or to the higher speed service term. When all conditions described above are met, termination liability for the remaining months on the original DS1 TPP will not apply. (Tx) (Tx)

(C) Moves

During a DS1 TPP term a customer may move one end of a DS1 High Capacity Service to another location in the same LATA and keep the DS1 TPP in force provided the following requirements are met:

(1) the customer must have met the minimum in-service period at the previous location and will be subject to a new minimum in-service period at the new location; and

(2) the Move is accommodated on a single customer order with the stipulation that the BAN (Billing Account Number), the NC (Network Channel Code), ACTL (Access Customer Terminal Location) and the ECCKT (Circuit Id) are provided and are the same as for the existing circuit being moved.

Moves to a different wire center may result in a change in the application of the rate elements associated with the service and therefore could result in a change in the monthly recurring charges.

EXAMPLE #1: One end of a DS1 is changed from Location A to Location B within the same LATA. The new Channel Mileage associated with the one-ended Move increased by 2 miles. Therefore, the resulting Channel Mileage calculation increases the monthly recurring charge accordingly. (Tx)

(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 498 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(C) Moves (Cont'd)

EXAMPLE #2: One end of a DS1 is changed from Location C to Location D within the same LATA. The new Channel Mileage associated with the one-ended Move decreased by 5 miles. Therefore, the resulting Channel Mileage calculation decreases the monthly recurring charge accordingly.

If no lapse in service occurs and if the requirements in (1) and (2) as stated previously are met, termination liability will not apply. Nonrecurring Channel Termination Charges or Nonrecurring Collocation Transport Charges and Access Order Charges for the physical move will apply.

(D) Expiration of DS1 TPP term options

The DS1 TPP is not available for renewal. At the expiration of the DS1 TPP term, the customer may select a new DS1 TPP term at the prevailing DS1 TPP rates. If a customer does not wish to purchase a new DS1 TPP at the expiration of the term, the customer's service will automatically convert to the current month-to-month rates. (Tx)

(E) DS1 High Capacity Service Portability Commitment

DS1 High Capacity Service Portability Commitment provides a customer the ability to establish a regional volume commitment in the form of DS1 Channel Terminations and receive a waiver on DS1 TPP Termination Liability, as described in 7.4.18(G), during the life of the Portability Commitment. The Portability Commitment will consist of a Commitment Level (CL), as described below, and will have a term of three years. The Portability Commitment does not otherwise affect the rates, terms, or conditions of the Customer's DS1 TPP. The Portability Commitment may be renewed. To renew, the Customer must notify the Telephone Company, in writing, with such notice directed to both the Customer's account manager and the access service center, and specifically identify the Customer's Commitment Level (as defined herein), prior to the expiration of the Customer's existing Portability Commitment term.

Customers may purchase DS1 service under DS1 TPP terms of 2, 3, 5, or 7 years and have the associated Channel Terminations count towards the CL. Access Order Charges and all installation charges will be billed as applicable. (Tx)

(Tx)
(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 498 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

Following are the terms and conditions associated with the Portability Commitment:

(1) Customer commits to a 3-Year Commitment Level (CL) that is reviewed on a monthly basis. The initial monthly CL is calculated by the Telephone Company and is the total of all DS1 Channel Terminations in-service for the month previous to the month in which the Customer notifies the Telephone Company, in writing, of the Customer's CL. The initial monthly CL will consist of all Channel Terminations including those on Month-to-Month terms and other term pricing plans. The effective date of the Portability Commitment will be the first day of the month immediately following the month in which the Portability Commitment is signed;

(2) Customer must have a minimum of 40 Channel Terminations in-service each month and at least 80% of the CL under a 2, 3, 5, or 7 year DS1 TPP each month; (Tx)

(3) At the commencement of the Customer's Portability Commitment and upon any renewal of a Portability Commitment, at least 80 percent of the Customer's CL must be purchased under a 2, 3, 5, or 7 year DS1 TPP; and (Tx)

(4) Each month, the total number of 2, 3, 5, and 7 year DS1 TPP Channel Terminations for the previous month will be calculated and measured against the corresponding monthly CL; (Tx)

(a) If the total number of Channel Terminations, as calculated above, is 80% - 124% of the CL, no other charges will apply for the previous month.

(b) If the total number of Channel Terminations, as calculated above, is less than 80% of the CL, charges will be assessed as follows:

(i) Customer will be billed the difference between 80% of the CL and the actual number of in-service Channel Terminations.

EXAMPLE #1:Customer A has a CL = 1,000 Channel Terminations for the month of June. Customer A must have at least 800 DS1 Channel Terminations in-service to meet the 80% target. In July, the monthly review calculated 795 DS1 Channel Terminations in-service for the month of June. The difference between 80% of the CL (800) and the actual in-service total (795) is 5 Channel Terminations. Therefore, the customer will be billed an amount equal to 5 Channel Terminations multiplied by the current Nonrecurring Channel Termination rate. For subsequent months, Customer A will continue to be billed an amount equal to the difference between 80% of the CL and the actual in-service number of Channel Terminations that are below 80% of the CL (multiplied) by the current nonrecurring Channel Termination rate, until 80% of the CL is met.

(Tx)
(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 498 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

(This page filed under Transmittal No. 501)

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

(4) (Cont'd)

(c) If the total number of in-service Channel Terminations, as calculated above, is more than 124% of the PC, the customer will be billed an adjustment factor equal to the Nonrecurring Channel Termination charge multiplied by the difference between the actual number of Channel Terminations in-service and 124% of the CL.

(i) EXAMPLE #2: Customer B has a CL of 500 Channel Terminations. In month 5 of the commitment, Customer B has 650 Channel Terminations in-service. Customer B has exceeded the CL by more than the 124% threshold (620). Customer B will be charged an adjustment factor equal to 30 Channel Terminations (650-620) multiplied by the current Nonrecurring Channel Termination rate. For subsequent months, Customer B will continue to be charged the Nonrecurring Channel Termination rate multiplied by the difference between the actual number of Channel Terminations in-service and 124% of the CL until Customer B no longer exceeds the CL by the 124% threshold. (T)

(d) Customers may increase the CL at any time by providing written notification to Telephone Company. Credits for previously charged adjustments billed for exceeding the CL will not be provided when a customer increases the CL. However, an adjustment factor will not be billed if notice to increase the CL is provided to the Telephone Company within the calendar month following a reported adjustment, and the CL increase is sufficient that the number of in-service rate elements does not exceed 124% of the new CL. For instance, in Example #2 above, if the Customer increases the CL from 500 to 525 before the end of month 6, the adjustment factor applicable to month 5 will not be billed because the actual in-service volume (650) is less than or equal to the new 124% threshold (651). (N) (N)

Some material previously on this page now appears on Original Page 7-140.5.1

(This page filed under Transmittal No. 440)

ACCESS SERVICE

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

(4) (Cont'd)

(e) If the customer elects to terminate the DS1 High Capacity Service Portability Commitment or elects to decrease the CL prior to the 3-Year commitment, Termination Liabilities will apply. Termination Liability is calculated as the decreased number of Channel Terminations multiplied by the prevailing Month-to-Month recurring rate multiplied by the number of months remaining in the term of the Portability Commitment. (M) (T) (T) (M)

(i) EXAMPLE #3: Customer C has a CL equal to 1,000 Channel Terminations. In month 10 of the 36-month Portability Commitment, Customer C elects to decrease the CL by 50 Channel Terminations. The Termination Liability associated with the decrease is equal to:

(50 Channel Terminations) X (26 months remaining) X (prevailing Month-to-Month Rate). (M)

Material on this page previously appeared on 5th Revised Page 7-140.5

(This page filed under Transmittal No. 440)

7. Special Access Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

(4) (Cont'd)

(ii) EXAMPLE #4: Customer D has a CL equal to 500 Channel Terminations. In month 20 of the 36-month Portability Commitment, Customer D elects to terminate the entire Portability Commitment. The Termination Liability associated with the termination of the entire Commitment is equal to:

(500 Channel Terminations) X (16 months remaining) X (prevailing Month-to-Month Rate)

(F) Applicable One-Time Charges

(1) Access Order Charge

Access Order Charges will apply, as described in section 5.2.1(A), to all order activity. An Access Order charge will apply on any changes made to a plan (e.g., moving from a 3 year to a 7 year plan, on physical moves of DS1 High Capacity Services, and new installations) as applicable. (Tx)

(2) DS1 Term Payment Plan Non-Recurring Charges

Non-recurring channel termination charge will apply per channel termination on new installations of DS1 High Capacity Service on 1 year DS1 TPP term, and on all physical moves of DS1 High Capacity Services. Non-recurring channel termination charges will be waived on new installations with 2, 3, 5, and 7 year DS1 TPP terms. The (Tx)
Nonrecurring Channel Termination Charge will also apply, (Tx)
applicable as stated in 7.4.18(E) previously, for customers who have a DS1 High Capacity Service Portability Commitment.

(Tx)
(Tx)

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ACCESS SERVICE

7. Special Access Service (Cont'd)

(N)

7.4 Rate Regulations (Cont'd)

7.4.18 DS1 Term Payment Plan (Cont'd)

(G) Termination Liability

Termination liability charges will apply in the following cases:

(1) In the event service is terminated prior to the expiration of the minimum service period, charges, as specified in Section 5.2.6 (Minimum Period Requirements), will apply in addition to the termination liability charges identified in 7.4.18(G)(2) following.

(2) In the event service is terminated prior to the end of the DS1 TPP term, a termination charge utilizing the following termination percentage will apply:

Termination Billing Period Percentage: 40%

The termination charge is calculated as follows:

(Monthly Recurring Rate) X (Months remaining in DS1 TPP term) X (Termination Billing Period Percentage)

Example: A customer with a $500 monthly rate terminates service with 10 months remaining in a 3 year DS1 TPP term. The termination liability charge would be calculated as follows:

($500) X (10) X (.40) = $2000

(N)

Southwestern Bell Telephone Company

DS1 Term Payment Plan (DS1 TPP)

Tariff F.C.C. No. 73, § 7.2.22

ACCESS SERVICE

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (DS1 TPP)

(A) General Description

The DS1 Term Payment Plan (DS1 TPP) is a term plan that allows a customer to purchase DS1 High Capacity Service over a 1, 2, 3, 5, or 7 year period. During the term of the selected DS1 TPP, Telephone Company initiated recurring rate changes (increases or decreases) will automatically be applied to the monthly payments for the remaining months of the current DS1 TPP term. The monthly recurring rate during the DS1 TPP term will never exceed the initial DS1 TPP rate. The DS1 TPP rates can be found in Section 7.3.10 (F)(10.4). (Tx)

The DS1 TPP cannot be combined with other discounts, or pricing flexibility contracts, unless explicitly stated in the respective tariff terms and conditions.

The following recurring rate elements are included in the DS1 TPP and are described in Section 7.3 (Service Descriptions):

- DS1 High Capacity Service Channel Termination
- DS1 High Capacity Service Channel Mileage - Fixed and Per Mile
- DS1 High Capacity Service Central Office Multiplexing
- DS1 High Capacity Service Collocation Transport (Fixed and Per Mile)

(Tx)
(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 3383 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (Cont'd)

(B) Conversion of service to a new DS1 TPP or Higher Speed Service

During a customer's DS1 TPP term, conversion may be made to a new DS1 TPP term of the same or different length or an upgrade may be made to a higher speed service, if the expiration date for the new DS1 TPP term or for the new higher service is beyond the end of the original DS1 TPP term. The new DS1 TPP term or higher speed service must occur between the same two termination points as the original DS1 service being converted. The new DS1 TPP term or the higher speed service term becomes effective upon completion of the conversion activity. The rates, terms, and conditions applicable for the new DS1 TPP term or higher speed service will be those in effect at the time the conversion is requested. Credit for months under the previous DS1 TPP may not be transferred to the new DS1 TPP or to the higher speed service term. When all conditions described above are met, termination liability for the remaining months on the original DS1 TPP will not apply. (Tx) (Tx)

(C) Moves

During a DS1 TPP term a customer may move one end of a DS1 High Capacity Service to another location in the same LATA and keep the DS1 TPP in force provided the following requirements are met:

(1) the customer must have met the minimum in-service period at the previous location and will be subject to a new minimum in-service period at the new location; and

(2) the Move is accommodated on a single customer order with the stipulation that the BAN (Billing Account Number), the NC (Network Channel Code), ACTL (Access Customer Terminal Location) and the ECCKT (Circuit Id) are provided and are the same as for the existing circuit being moved.

(Tx)
(Tx)

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7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd) (N)

7.2.22 DS1 Term Payment Plan (Cont'd)

(C) Moves (Cont'd)

Moves to a different wire center may result in a change in the application of the rate elements associated with the service and therefore could result in a change in the monthly recurring charges.

EXAMPLE #1: One end of a DS1 is changed from Location A to Location B within the same LATA. The new Channel Mileage associated with the one-ended Move increased by 2 miles. Therefore, the resulting Channel Mileage calculation increases the monthly recurring charge accordingly.

EXAMPLE #2: One end of a DS1 is changed from Location C to Location D within the same LATA. The new Channel Mileage associated with the one-ended Move decreased by 5 miles. Therefore, the resulting Channel Mileage calculation decreases the monthly recurring charge accordingly.

If no lapse in service occurs and if the requirements in (1) and (2) as stated previously are met, termination liability will not apply. Nonrecurring Channel Termination Charges or Nonrecurring Collocation Transport Charges and Access Order Charges for the physical move will apply.

(D) Expiration of DS1 TPP Term Options

DS1 TPP is not available for renewal. At the expiration of the DS1 TPP term, the customer may select a new DS1 TPP term at the prevailing DS1 TPP rates. If a customer does not wish to purchase a new DS1 TPP at the expiration of the term, the customer's service will automatically convert to the current month-to-month rates.

(N)

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment

DS1 High Capacity Service Portability Commitment provides a customer the ability to establish a volume commitment in the form of DS1 Channel Terminations and receive a waiver on DS1 TPP Termination Liability, as described in 7.2.22 (G), during the life of the Portability Commitment. The Portability Commitment will consist of a Commitment Level (CL), as described below, and will have a term of three years. The Portability Commitment does not otherwise affect the rates, terms, or conditions of the Customer's DS1 TPP. The Portability Commitment may be renewed. To renew, the Customer must notify the Telephone Company, in writing, with such notice directed to both the Customer's account manager and the access service center, and specifically identify the Customer's Commitment Level (as defined herein), prior to the expiration of the Customer's existing Portability Commitment term. Customers may purchase DS1 service under DS1 TPP terms of 2, 3, 5, or 7 years and have (Tx) the associated Channel Terminations count towards the CL. Access Order Charges and all installation charges will be billed as applicable.

Following are the terms and conditions associated with the Portability Commitment:

(1) Customer commits to a 3-Year Commitment Level (CL) that is reviewed on a monthly basis. The initial monthly CL is calculated by the Telephone Company and is the total of all DS1 Channel Terminations in-service for the month previous to the month in which the Customer notifies the Telephone Company, in writing, of the Customer's CL. The initial monthly CL will consist of all Channel Terminations including those on Month-to-Month terms and other term pricing plans. The effective date of the Portability Commitment will be the first day of the month immediately following the month in which the Portability Commitment is signed;

(2) Customer must have a minimum of 40 Channel Terminations in-service each month and at least 80% of the CL under a 2, 3, 5,or 7 year DS1 TPP each month; (Tx)

(3) At the commencement of the Customer's Portability Commitment and upon any renewal of a Portability Commitment, at least 80 percent of the Customer's CL must be purchased under a 2, 3, 5, or 7 year DS1 TPP; (Tx) and (Tx)

(Tx)

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7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

(4) Each month, the total number of 2, 3, 5, and 7 year DS1 TPP Channel Terminations for the previous month will be calculated and measured against the corresponding monthly CL; (Tx)

(a) If the total number of Channel Terminations, as calculated above, is 80% - 124% of the CL, no other charges will apply for the previous month.

(b) If the total number of Channel Terminations, as calculated above, is less than 80% of the CL, charges will be assessed as follows:

(i) Customer will be billed the difference between 80% of the CL and the actual number of in-service Channel Terminations.

EXAMPLE #1: Customer A has a CL = 1,000 Channel Terminations for the month of June. Customer A must have at least 800 DS1 Channel Terminations in-service to meet the 80% target. In July, the monthly review calculated 795 DS1 Channel Terminations in-service for the month of June. The difference between 80% of the CL (800) and the actual in-service total (795) is 5 Channel Terminations. Therefore, the customer will be billed an amount equal to 5 Channel Terminations multiplied by the current Nonrecurring Channel Termination rate. For subsequent months, Customer A will continue to be billed an amount equal to the difference between 80% of the CL and the actual in-service number of Channel Terminations that are below 80% of the CL (multiplied) by the current nonrecurring Channel Termination rate, until 80% of the CL is met.

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7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

(4)(Cont'd)

(c) If the total number of in-service Channel Terminations, as calculated above, is more than 124% of the CL, the customer will be billed an adjustment factor equal to the Nonrecurring Channel Termination charge multiplied by the difference between the actual number of Channel Terminations in-service and 124% of the CL.

(i) EXAMPLE #2: Customer B has a CL of 500 Channel Terminations. In month 5 of the commitment, Customer B has 650 Channel Terminations in-service. Customer B has exceeded the CL by more than the 124% threshold (620). Customer B will be charged an adjustment factor equal to 30 Channel Terminations (650-620) multiplied by the current Nonrecurring Channel Termination rate. For subsequent months, Customer B will continue to be charged the Nonrecurring Channel Termination rate multiplied by the difference between the actual number of Channel Terminations in-service and 124% of the CL until Customer B no longer exceeds the CL by the 124% threshold. (T)

(d) Customers may increase the CL at any time by providing written notification to Telephone Company. Credits for previously charged adjustments billed for exceeding the CL will not be provided when a customer increases the CL. However, an adjustment factor will not be billed if notice to increase the CL is provided to the Telephone Company within the calendar month following a reported adjustment, and the CL increase is sufficient that the number of in-service rate elements does not exceed 124% of the new CL. For instance, in Example #2 above, if the Customer increases the CL from 500 to 525 before the end of month 6, the adjustment factor applicable to month 5 will not be billed because the actual in-service volume (650) is less than or equal to the new 124% threshold (651). (N) (N)

(e) If the customer elects to terminate the DS1 High Capacity Service Portability Commitment or elects to decrease the CL prior to the 3-Year commitment, Termination Liabilities will apply. Termination Liability is calculated as the decreased number of Channel Terminations multiplied by the prevailing Month-to-Month recurring rate multiplied by the number of months remaining in the term of the Portability Commitment. (T) (T)

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (Cont'd)

(E) DS1 High Capacity Service Portability Commitment (Cont'd)

(4) (Cont'd)

(T)

(i) EXAMPLE #3: Customer C has a CL equal to 1,000 Channel Terminations. In month 10 of the 36-month Portability Commitment, Customer C elects to decrease the CL by 50 Channel Terminations. The Termination Liability associated with the decrease is equal to:

(50 Channel Terminations) X (26 months remaining) X (prevailing Month-to-Month Rate)

(ii) EXAMPLE #4: Customer D has a CL equal to 500 Channel Terminations. In month 20 of the 36-month Portability Commitment, Customer D elects to terminate the entire Portability Commitment. The Termination Liability associated with the termination of the entire commitment is equal to:

(500 Channel Terminations) X (16 months remaining) X (prevailing Month-to-Month Rate)

(F) Applicable One-Time Charges

(1) Access Order Charge

Access Order Charges will apply, as described in section 5.3.1, to all order activity. An Access Order charge will apply on any changes made to a plan (e.g., moving from a 3 year to a 7 year plan, on physical moves of DS1 High Capacity Services, and new installations) as applicable.

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.22 DS1 Term Payment Plan (Cont'd)

(F) Applicable One-Time Charges

(2) DS1 Term Payment Plan Non-Recurring Charges

Nonrecurring Channel Termination charges will apply per Channel Termination or the nonrecurring Collocation Transport nonrecurring charge will apply on new installations of DS1 High Capacity Service on 1 year DS1 TPP term, and on all physical moves of DS1 High Capacity Services. Nonrecurring Channel Termination charges and nonrecurring Collocation Transport charges will be waived on new installations with 2, 3, 5, and 7 year DS1 TPP terms. The (Tx)
Nonrecurring Channel Termination Charge will also apply, applicable as stated in 7.2.22(E) previously, (Tx)
for customers who have a DS1 High Capacity Service Portability Commitment.

(G) Termination Liability

Termination liability charges will apply in the following cases:

(1) In the event service is terminated prior to the expiration of the minimum service period, charges, as specified in Section 5.3.4 (Minimum Period Requirements), will apply in addition to the termination liability charges identified in 7.2.22(G)(2) following. (Tx)

(2) In the event service is terminated prior to the end of the DS1 TPP term, a termination charge utilizing the following termination percentage will apply:

Termination Billing Period Percentage: 40%

The termination charge is calculated as follows:

(Monthly Recurring Rate) X (Months remaining in DS1 TPP term) X (Termination Billing Period Percentage)

Example: A customer with a $500 monthly rate terminates service with 10 months remaining in a 3 year DS1 TPP term. The termination liability charge would be calculated as follows:

($500) X (10) X (.40) = $2000

(Tx)
(Tx)

(x) Issued under authority of Special Permission No. 14-001 of the FCC in order to withdraw material filed under Transmittal No. 3383 and suspended under Order DA-13-2349, released December 9, 2013, without its becoming effective and to restore currently effective material.

(This page filed under Transmittal No. 3386)